Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

V.

v.

FAO

121st Session **Judgment No. 3596**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. V. against the Food and Agriculture Organization of the United Nations (FAO) on 25 October 2013 and corrected on 27 November 2013, the FAO's reply of 17 March 2014, the complainant's rejoinder of 28 April and the FAO's surrejoinder of 25 August 2014;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the decision not to extend his fixed-term appointment and to place him on special leave with pay until his contract expired.

On 31 March 2011 the complainant, who had been the FAO representative in the Lao People's Democratic Republic since March 2007, was informed by e-mail of the contents of a letter, dated 22 February 2011, sent by the Ministry of Agriculture and Forestry of Laos to the FAO Headquarters in Rome, in which his manner of working and, in particular, his lack of cooperation with the Ministry had been criticised. These concerns had already been brought to the

attention of the Director-General in autumn 2007, and the complainant had been informed of this orally at the time. In the e-mail the complainant was asked to comment urgently. He did so on 9 April 2011, referring to strong political rivalry within the Lao Government and saying that he had inherited a somewhat dysfunctional situation following the dismissal of a colleague. He also admitted that he had not been proactive with regard to certain projects owing to a shortage of qualified staff.

The Regional Representative for Asia and Pacific notified the complainant by a memorandum of 27 May 2011 that he intended to recommend to the Director-General that his fixed-term appointment should not be renewed beyond its expiry date, i.e. 31 December 2011, and that he should be placed on special leave with pay as of 1 July 2011. The complainant was invited to submit his comments thereon, but he did not do so, despite several reminders from the Organization. The complainant was informed by a letter of 30 June 2011 that the Director-General, who considered that relations with the Lao Government had been jeopardised, had decided to accept the recommendations made in the memorandum of 27 May. He acknowledged receipt of this decision by e-mail on 2 July and signed the hard copy on 4 July.

On 18 August 2011 the complainant asked the Director-General to reverse the "decisions" of the Regional Representative for Asia and Pacific to place him on special leave and not to renew his contract, and to reinstate him in his functions or to transfer him to another suitable post elsewhere in the Organization. In addition, he requested the extension of his contract until he reached the mandatory retirement age in September 2012. He reserved the right to claim damages if the Director-General did not grant his requests. As this appeal was dismissed by a decision of 17 October 2011, the complainant referred the matter to the Appeals Committee. He requested that the latter decision be withdrawn, that he be reinstated in a post commensurate with his qualifications, that he be paid his salary, allowances and pension benefits for the period preceding reinstatement and that he be awarded 50,000 euros in moral damages and 1,000 euros for legal expenses.

The Appeals Committee issued its report on 11 March 2013. It considered that, since the measures recommended in the memorandum of 27 May 2011 were identical to those ultimately taken on 30 June, the appeal should be deemed receivable. On the merits, it found that the Director-General had properly exercised his discretion and that the decision to place the complainant on special leave with pay had not harmed his dignity. It therefore recommended the dismissal of the appeal.

By a letter of 18 July 2013, which constitutes the impugned decision, the Director-General informed the complainant that he had decided to accept the Appeals Committee's recommendation.

On 25 October 2013 the complainant filed a complaint with the Tribunal requesting the setting aside of the impugned decision, the "restoration of [his] rights" and the payment of 500,000 euros in compensation for the moral and professional injury which he considers he has suffered.

The FAO submits that the complaint is irreceivable *ratione temporis* and *ratione materiae*. However, if the Tribunal were to consider that this is not the case, it asks it to declare the complaint unfounded.

CONSIDERATIONS

1. The FAO contends that the appeal is not receivable because internal means of redress have not been exhausted in accordance with Article VII, paragraph 1, of the Statute of the Tribunal.

2. The decision of the Director-General of 30 June 2011 not to extend the complainant's appointment when it expired on 31 December 2011 and to place him on special leave with pay was entirely consonant with the recommendations of the Regional Representative for Asia and Pacific of which the complainant had been notified by the memorandum of 27 May 2011.

In his appeal of 18 August 2011, the complainant did not seek the setting aside of the decision of 30 June 2011. He challenged the recommendations contained in the memorandum of 27 May 2011, which

he termed "decisions". The FAO infers from this that the Appeals Committee should have found that the appeal lodged with it on 14 December 2011 was irreceivable, since no internal appeal had been filed within the 90-day time limit laid down in the Staff Rules against the decision of 30 June 2011, which alone could form the subject of an internal appeal. It concludes that the complaint is therefore irreceivable *ratione temporis* and *ratione materiae*.

3. The submissions in the file shed no clear light on why the complainant directed his internal appeals against the memorandum of 27 May 2011 without any indication that he was challenging the decision of 30 June 2011 of which he had already been notified. However, it is unnecessary to dwell on this matter which, for the reasons explained below, is irrelevant.

In his appeal of 18 August 2011 to the Director-General, and again in his appeal of 14 December 2011 to the Appeals Committee, the complainant unambiguously challenged, firstly, his placement on special leave with pay until the expiry of his fixed-term appointment and, secondly, the non-extension of his contract. Both of these measures formed the subject of the decision of 30 June 2011 which, as already stated, was entirely consonant with the recommendations contained in the memorandum of 27 May 2011. In these circumstances, it would be excessively formalistic not to consider that in these appeals the complainant was implicitly challenging the decision of 30 June 2011.

Moreover, the behaviour of the FAO during proceedings was, to say the least, questionable as far as good faith is concerned, since in the decision of 17 October 2011, by which the Director-General dismissed the appeal of 18 August 2011, the issue of whether or not the appeal was receivable in view of the fact that it was not explicitly directed against the decision of 30 June 2011 was not raised. It was not until 6 February 2012, in other words in the Organization's reply to the appeal of 14 December 2011, that it first contested the receivability of this appeal.

In these circumstances, the FAO's objection to receivability will not be accepted.

4. The decision not to extend the complainant's fixed-term appointment with the Organization, which ended on 31 December 2011, did not constitute dismissal (see Judgment 2171, under 4). Moreover, the complainant does not cite any provision of the Staff Regulations which would have guaranteed the right to an extension of his appointment beyond its expiry date; nor does he rely on assurances on the basis of which he might legitimately have expected that this contract would then be extended.

However, the Tribunal's case law requires an international organization to give reasonable notice of the non-renewal of a fixed-term appointment (see Judgment 3448, under 8). In the instant case, this requirement has been met, since the complainant was notified of the decision not to extend his appointment six months before it expired and one month after he had been advised that the Director-General would be recommended to take this measure. He therefore received reasonable notice within the meaning of the Tribunal's case law. The complainant's criticism with regard to the non-renewal of the fixed-term appointment is therefore devoid of merit.

5. It remains to be considered whether the complainant's criticism concerning the decision to place him on special leave with pay as from 1 July 2011, i.e. for the six months preceding the expiry of his contract, is well founded.

This decision was tantamount to immediately terminating the employment relationship which would normally have continued during that period. The Organization did not, however, regard it as a disciplinary measure for any breaches of professional duties by the complainant, but as an essential means of maintaining the relationship of trust between itself and the authorities of a country where the complainant was its principal representative.

6. The Organization explains that its decision to place the complainant on leave immediately was taken on the basis of Staff Regulation 301.5.2, which states that special leave may be authorized by the Director-General for such periods as, in accordance with Staff

Rule 302.5.21, the Director of the Human Resources Management Division may determine.

7. The Tribunal notes, however, that this special leave is perceived as a privilege granted to staff for training, or in the event of an extended illness, for example.

By unilaterally placing the complainant on special leave in order to deprive him of his functions, the FAO breached the provisions on which it relies and took a decision for a purpose other than those contemplated by the provisions in question. In so doing, it committed both an error of law and an abuse of authority.

8. It follows that the impugned decision of 18 July 2013 and those of 30 June 2011 and 17 October 2011 must be set aside insofar as they concern the placement of the complainant on special leave.

9. The complainant is entitled to damages in compensation for the injuries resulting from these decisions. The Tribunal notes, however, that the complainant retained his remuneration during the period of special leave, and that situation will not be affected by this judgment. In addition, it is clear from the evidence in the file that the Organization had good reason to consider that the complainant's action at his duty station and his manner of conducting the operations for which he was responsible were such as to jeopardise the Organization's credibility with the authorities of the country concerned and to compromise the success of these operations.

The removal of the complainant from his functions, even if it should have taken a different form, was therefore legitimate in substance.

Having regard to all these circumstances, the Tribunal considers that the injuries suffered by the complainant will be fairly redressed by awarding him compensation in the amount of 2,000 euros under all heads.

DECISION

For the above reasons,

1. The decision of the Director-General of the FAO of 18 July 2013 and those of 30 June 2011 and 17 October 2011 are set aside insofar as they concern the placement of the complainant on special leave.

2. The Organization shall pay the complainant compensation in the amount of 2,000 euros under all heads.

3. All other claims are dismissed.

SEPARATE OPINION OF JUDGE ROUILLER, PRESIDENT OF THE TRIBUNAL, CONCERNING CONSIDERATIONS 7 AND 8 OF THE JUDGMENT

1. The actions of the complainant, in his capacity as FAO representative in the Lao People's Democratic Republic, had led the Government of that State to complain bitterly to the Organization on several occasions. The awkward situation that the Organization thus faced, the intricacies of which lay beyond the scope of the Tribunal's review, gave it objective reasons not to retain the complainant in his post.

Instead of transferring him – which was scarcely conceivable given the particular features of the case – or immediately dismissing him, or temporarily suspending him pending disciplinary proceedings, it decided unilaterally to place him on special leave with pay during the six months prior to the expiry of his employment contract. This was probably the most favourable outcome that the complainant could have obtained in the circumstances. However, it has been established that this result was achieved only through an incorrect application of the provision on which the Organization relied, as was stated in consideration 7 of our judgment. We are therefore faced with an instance of improper purpose which, under our current case law, should in principle lead to the setting aside of the decision, irrespective of whether the result of the decision was right

or wrong, or whether in the particular circumstances of the case it was the most favourable result for the person concerned.

2. This approach makes sense where an administration engages in grossly unlawful conduct by using the power conferred upon it by a rule for purposes manifestly alien to those for which the rule has been established.

In some circumstances, however, it may reflect a sort of veneration of the letter of the law which is not conducive to the proper administration of justice. That is why, in many legal systems, a gross breach of a rule of positive law does not *in principle* lead to the quashing of the decision which is tainted by the breach. The decision is quashed only if the result of the decision is itself arbitrary, otherwise the remedy must lie in preserving a result which is itself consistent with positive law by *replacing* flawed grounds with lawful ones, *provided, of course, that this does not breach the right of the person concerned to be heard, which would be the case if the substitute grounds had not been discussed with her or him*.

3. This is the approach taken by the Constitutional Court of the Swiss Confederation in its well-known case law on *arbitrariness*, the foundations of which were laid fifty years ago around the time when the French Council of State was developing its case law on improper purpose. It need hardly be recalled that this judicial construct, *arbitrariness*, has enjoyed great success and has been introduced into numerous European legal systems as a sequel to the right to equal treatment. Indeed, it is encountered in the form of the *Willkürverbot* in German and Austrian law, for example.

In the Swiss legal system – which, of course, also recognizes the notions of *ultra vires* or abuse of authority – *improper purpose* (like *gross error of law*) is not a separate legal notion employed as such in administrative practice and case law. It is merely an unidentified category of *arbitrariness* implicit in the provisions of the Constitution on the *prohibition of arbitrariness*, which is a rule of conduct, and on *the protection of the individual against arbitrary conduct on the part*

of the State, which is a right conferred on the individual by public law. Arbitrariness, which is also termed a *substantive denial of justice*, includes any gross violation of the law which renders *the result* of a decision *manifestly unsustainable*. A decision will not therefore be set aside solely because it rests on arbitrary reasons. Its result must also be arbitrary. Where this is not the case, in principle the court has a duty to *substitute alternative grounds*, in other words to replace the arbitrary reasons with non-arbitrary ones. This judicious practice meets the categorical imperative of efficient administration subject to the law.

4. On this basis, it appeared at first sight that the impugned decision could be preserved by finding that:

(a) the staff member had had an opportunity to express his views fully on the material facts and their incompatibility with the proper functioning of the Organization before the disputed measure was taken;

(b) having regard to the material facts, the decision affecting the complainant could not have been materially and essentially different or more favourable to him, irrespective of the legal basis which should have underpinned the Organization's decision, and indeed, this is clearly the conclusion which must be drawn from consideration 9 of our judgment.

5. Ultimately, however, it was right to allow the complaint only in part for the reason implicit in the judgment, namely that a *substitution of reasons* in the manner described above cannot breach the fundamental right to be heard (the guarantee of a fair trial) which in Swiss constitutional law, for example, constitutes a category of *formal denial of justice*.

Since, as was noted in paragraph 4(a) above, this condition was met here, it would certainly have been possible to find that the general rule (a sort of overriding mandatory provision) requiring the organs of the Organisation to ensure the latter's proper functioning constituted a sufficient legal basis to warrant the disputed measure of discharging the complainant from his duties immediately without financial injury.

It is, however, likely that that measure could have been perceived by the complainant as an act intended to circumvent the provisions on disciplinary proceedings where, from his point of view, his right to be heard would have been better safeguarded.

6. Although for this sole reason I agree with the judgment, I wished to comment on it. The high esteem in which our Tribunal's case law is held at the international level owes much to contribution made by the particular notions to be found in the law of each of the home countries of its seven judges.

In witness of this judgment, adopted on 12 November 2015, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ