

FORTY-THIRD ORDINARY SESSION

In re HOEFER

Judgment No. 406

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the United Nations Food and Agriculture Organization (FAO) by Mr. Ernst Hoefler on 18 September 1978, the FAO's reply of 24 November, the complainant's rejoinder of 12 December, the FAO's surrejoinder of 22 February 1979, the complainant's further memorandum of 10 March, the FAO's reply thereto of 27 September and the complainant's observations of 5 November 1979;

Considering Article II, paragraph 5, of the Staff of the Tribunal and FAO Staff Regulation 301.103, Staff Rules 302.723 and 302.910 and Manual sections 314.33, 314.7, 331.325, 370.821 and 370.831;

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. On 25 March 1974 the complainant, a United States citizen, joined the staff of the FAO and was sent out to Chad on a one-year appointment as a "grain marketing officer" at grade P.5. His duties were, in the short term, to advise the fund for the development of rural activities (FDAR) on emergency relief operations for the distribution of food aid in Chad, which was stricken by drought, and, in the long term, to advise the "elaboration and implementation of a policy on cereals". He was also to hold training courses for the technical staff. According to the terms of his employment (which appear in Annex 2 to the complaint) the appointment was for 12 months, including six months' probation. Under clause 20 it might be terminated by either party upon notice of 30 days; and under clause 22 he might be transferred to another post or duty station according to the needs of the Organization, but with due consideration of his personal needs. On his "personal history form" he had stated that his ability to read, write and speak French was excellent. Before he left Rome the FAO found that his French needed improvement, but decided nevertheless to send him to Chad.

B. On 10 July 1974 the technical supervisor of the marketing branch of the Agricultural Operations Division, who was in charge of monitoring the complainant's mission and had just come back from an inspection visit to Chad, wrote a memorandum to the Division. He admitted that conditions in the country made the mission a very difficult one and said that the Minister of Public Works and Town and Country Planning had asked for Mr. Hoefler's co-operation and guidance for projects falling well beyond his terms of reference. But his "French is still very marginal and as senior adviser he is most reluctant; to put his hands on what comes up as a mere executive job due to lack of initiative on the counter-part side". In the supervisor's opinion the complainant was not the right man for the job and the Government might ask for his withdrawal (Appendix E to the FAO's reply). On 20 July the FAO country representative and chief agricultural adviser in Chad informed the Minister of Public Works and Town and Country Planning that the FAO was proposing to transfer the complainant to Uganda and replace him in Chad. In his reply of 22 July the Minister merely said: "We should like someone to replace Mr. Hoefler". But nothing came of the transfer to Uganda and the complainant continued to work in Chad. On 18 September the Minister wrote to the FAO country representative to say that "because of his poor spoken French" the complainant's work was "ineffective" and to ask the representative to inform the FAO that the complainant was no longer on his staff. By a telegram of 30 September and a letter of 21 October the FAO ordered the complainant to return to Rome to discuss reassignment on the grounds that the Government of Chad had asked for the termination of his assignment, and told him that a travel authorisation form had been issued for him. The complainant felt that that was a trick on the part of the country representative in Chad, all the more so because he had never got the "travel authorisation". He therefore refused to comply and continued his mission. (The complainant contends that the authorisation was intercepted by the country representative and handed over to him in February 1975 only on the instructions of the new resident representative of the United Nations Development Programme; but the FAO says that it simply went missing.) He protested to the Director-General, but to no avail, and throughout December 1974 the FAO appealed to the Government of Chad to force him out of the country. On 19 December the Minister for Foreign Affairs wrote to the FAO representative to say that the complainant was working with the Director of the FDAR. He went on the

expert himself would like to continue until 24 March 1975, when his appointment expires, and so abide by his commitments to the FAO".

C. On 23 December 1974 the FAO informed the complainant that it was terminating his appointment with effect from 31 December in accordance with Manual section 370.831(v), on the grounds of unsuitability for the assignment. The complainant protested at once, refused to leave, and continued work. The FAO there upon cancelled the termination of the appointment and let it expire on 24 March 1975 in accordance with Manual section 370.821, which reads: "All fixed-term appointments expire without prior notice on the specified expiration date unless the expert has been notified to the contrary in writing". The complainant's salary, which had been stopped, was paid to him until the termination of his appointment, as well as the usual allowances. But when he returned to Rome in March 1975, the FAO refused to discuss any new assignment with him.

D. In July 1975 the complainant appealed to the FAO Appeals Committee. In its report the Committee recorded "its concern that a person should have been sent out to a notoriously difficult field project without sufficient cheeks" as to his possession of such "a qualification as command of the appropriate language". It held, however, (a) that, whatever his own assessment might be, the complainant did not know enough French for his work in Chad; (b) that his failure to comply with instructions to return to headquarters seemed unjustified, though not followed by any disciplinary measure; and (c) that in separating him the FAO had neither acted from prejudice nor allowed extraneous factors to operate in its decisions, which in any event were not in breach of the Staff Regulations, Staff Rules or Administrative Manual; and (d) that accordingly the complainant had no claim for reinstatement, renewal of contract or compensation.

E. In his memoranda the complainant accuses the FAO representative in Chad of having withheld his travel authorisation form for four months in the hope that he would leave Chad without it and so be liable to the sanctions prescribed in Staff Rule 302.723 and Manual section 314.33 for abandonment of post. He was, he says, anxious to avoid that trap, and in any case had no reason to break off his mission, which was proceeding as planned and to the satisfaction of the Government of Chad. The FAO was misled by its representative in Chad who, being displeased to see the complainant assert his function as adviser instead of taking on responsibility for emergency relief, prompted the Minister of Public Works and Town and Country Planning to ask for his recall on the pretence that his French was poor. If his knowledge of French had really been so poor he would never have completed his mission with the success which the FAO acknowledges in the end-of-mission evaluation report. His recall was in breach of the provisions of the Manual on sanctions. Lastly, by refusing to consider renewing his contract on the termination of his mission the FAO was in breach of duty: at the time of his appointment to Chad there had been an implied agreement that his contract would be renewed since the project was to last for several years. In acting as it did the FAO misinterpreted the facts, misapplied the Staff Regulations and Staff Rules and was guilty of abuse of authority, and so cause him serious material and moral injury, and in particular damage to his later career. Moreover, the Appeals Committee proceedings were tainted with irregularities. For example, the chairman showed prejudice against him. The Committee also states in its report that it met on 25 February 1977: on that day the complainant was absent and he was therefore denied his right to a hearing.

F. The complainant asks the Tribunal (1) to quash the decision of June 1978; (2) to order the FAO to pay him salary from the date on which it ceased to be paid until the date of the complaint or for any other period which the Tribunal deems proper, with due regard to the fact that in all probability his contract would have been extended for four years at grade P.5, step 1; (3) to order the FAO to pay him the sums due under the pension scheme in respect of the above-mentioned salary; (4) to order the FAO to pay him 1,000 dollars in costs; (5) to order the FAO to pay him interest at 8 per cent a year on those sums from 31 December 1974 or any other date which the Tribunal deems proper; (6) to order the FAO to expunge from the record all remarks which reflect adversely on the complainant's performance or conduct, including any documents relating to the termination of his appointment, which was in breach, in particular, of Staff Rule 302.910 (effective date of separation) and Manual section 314.7 (separation procedure); and (7) to order the FAO to grant him such relief as the Tribunal deems proper for the energy, time and money he has devoted to defending his rights for almost four years.

G. The FAO says that the complainant was never given the slightest promise that his appointment would be extended. It was obvious from the outset that the expert was needed only for the first stage of the project. Had he gone back to Rome when recalled, the FAO would have tried to find him another assignment, but since his appointment expired at the prescribed date it was under no duty to do so. His withdrawal was not a disciplinary sanction. Although the complainant's technical competence was fully acknowledged in the final evaluation report of 4 April 1975, the FAO had genuine doubts about his suitability and so at one time considered transferring him to

Uganda. He is mistaken in alleging that he might have incurred a sanction for abandonment of post had he returned to Rome without the travel authorisation form, since the many telegrams and letters he had received ordering him to go to Rome would have given him ample grounds for doing so. Lastly, the Appeals Committee did not meet before 24 March, and the reference in its report to a meeting on 25 February is just a mistake. The complainant has not put forward any legal argument to show that the FAO was in breach of its obligations under its fixed-term contract with him, or that it was under any duty to offer him another appointment. His many charges of prejudice, harassment and chicanery on the part of inefficient officials are groundless. The FAO asks the Tribunal to dismiss the complaint.

H. The FAO appends to its surrejoinder a copy of a letter sent on 19 September 1974 to the Agricultural Operations Division by the FAO representative in Chad saying that it was "high time" that the complainant was withdrawn. In the same letter the representative said that though he knew "hardly anything of the [complainant's] work", its usefulness was much impaired by his difficulty in speaking French. He had heard it said, moreover, that the complainant "was suffering from nervous depression". In a further memorandum the complainant protests vigorously against those allegations, which he says constituted base and wholly unfounded calumnies intended to destroy him in the FAO's eyes. He was never shown the letter of 19 September 1974 nor allowed to defend himself against it, and it led the FAO to act to his detriment. In its observations in reply the FAO states that its sole motive in submitting the document is to make the dossier complete. In fact it was not that letter which made the FAO remove the complainant. Several months earlier it knew that there were difficulties over his assignment and that it would have to be terminated. Besides, the letter was neither malicious nor untrue: it confirmed that the complainant's French was not good enough. It is quite unthinkable that the author should have invented a reference to the complainant's nervous condition. As FAO representative in Chad he had the duty to inform the FAO of his view that the complainant should be removed. In reply the complainant observes that the letter of 19 September 1974 contains a medical assessment by someone who was not competent to give it and that the FAO nevertheless relied on that letter in taking decision to his detriment. Moreover, it concealed the letter's existence, since he was not aware of it until he found it appended to the surrejoinder. He believes that the FAO has introduced the subject of the letter in order to evade the main subject of the dispute, namely its wrongful breach of the contract, and in seeking to justify the letter by affirming that it was neither malicious nor untrue, has gravely harmed his reputation.

CONSIDERATIONS:

MS 370.821 states that all fixed-term appointments expire without prior notice on the specified expiration date unless the expert has been notified in writing to the contrary. The rule thus envisages the possibility of an extension; and an expert, whose assignment has run smoothly and for whom the circumstances show a continuing need, is entitled to expect that the rule will not be enforced invariably and as a matter of course, but that an unprejudiced decision will be taken in the interests of the Organization. This does not mean that the Organization is required to justify a non-renewal as if it was an interference with a contractual right.

In the present case the assignment, which was for one year beginning in March 1974, proved to be a very difficult one. By July the complainant's suitability for the job was being questioned and his replacement was under discussion with the Government of Chad. In October he was recalled to headquarters to discuss reassignment, but he failed or refused to go. In December the Organization proposed to terminate his appointment summarily, but in the event it allowed the appointment to terminate by effluxion of time.

In these circumstances it appears to be natural, if not inevitable, that the appointment should not be renewed and a complainant can hope to attack a decision to that effect only if he can adduce concrete evidence of prejudice or illegality. There is no such evidence in the dossier. What the complainant produces is a huge quantity of material on what he describes as the fundamental cause for the complaint, which is the FAO tortious fundamental unilateral breach of Complainant's contract for services with FAO together with FAO tortious handling of Complainant Travel Authorization and FAO related misconduct". The Tribunal will not review in detail this material. It may or may not be such as would give the complainant a remedy for breach of contract. But its only relevance to a complaint of non-renewal is to show that the relationship between the parties was such that it could not conceivably be in the interests of the Organization to continue it.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public sitting in Geneva on 24 April 1980.

André Grisel
Devlin
H. Armbruster

Bernard Spy

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