P. (No. 3)

v.

FAO

129th Session **Judgment No. 4230**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr M. P. against the Food and Agriculture Organization of the United Nations (FAO) on 30 April 2018, corrected on 1 June, the FAO's reply of 17 September, the complainant's rejoinder of 15 November 2018 and the FAO's surrejoinder of 8 March 2019;

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 to introduce a maximum length of employment under short-term appointments in breach of applicable rules on consultation with staff representatives.

Administrative Circular No. 2015/07 of 6 March 2015 introduced, with immediate effect, a maximum length of employment for holders of short-term appointments governed by Section 316 of the FAO Administrative Manual. Thus, the holders of such appointments in the General Service and Professional categories could not be re-employed by the FAO under that type of appointment once they reached a total, aggregate period of 55 months of service. The Circular provided that appropriate changes to the Manual would be issued shortly.

In May 2015 the complainant, who held a continuing appointment, was elected General Secretary of the Union of General Service Staff (UGSS). He held that position until he separated from service on 31 August 2016. He was also a member of the Staff Management Consultative Committee (SMCC). On 3 June 2015 he filed an appeal with the Director-General asking that the Circular be withdrawn. He stated that the way the Circular was issued, and also its content, caused him moral and reputational damage as a staff member and as General Secretary of the UGSS. He alleged violation of Staff Rule 302.8.3, of the Recognition Agreement of 22 October 1976 between the FAO Director-General and the UGSS, and past practices. He also alleged breach of due process insofar as the UGSS had not been informed during the consultation process that the Circular would be applied with "retroactive" effect. The breach of due process had a negative impact on the exercise of his statutory duties as General Secretary of the UGSS. He further submitted that the FAO had shown bad faith during the consultation process. He drew attention to the Standards of Conduct for the International Civil Service issued by the International Civil Service Commission (ICSC), according to which relations between management and staff should be guided by mutual trust and respect.

Following the rejection of his appeal, in August 2015 the complainant filed an appeal with the Appeals Committee. In its report of 25 September 2017 the Appeals Committee held that the appeal was receivable only insofar as the complainant had filed it in his capacity as General Secretary of the UGSS alleging failure to consult the UGSS. It recommended, by a majority, that the Circular be withdrawn and that, "[u]nless proper and meaningful consultations on the amended 55-month rule were held following the issuance of [the Circular] and prior to the adoption of current Manual paragraphs 316.2.57 and 316.2.58", the implementation of the latter paragraphs should be suspended until proper and meaningful consultations had taken place. Two members of the Appeals Committee indicated that they did not agree with these recommendations; they agreed with the arguments put forward by the Organization that proper consultation had taken place.

By a letter of 2 February 2018 the Director-General informed the complainant that his appeal was receivable only insofar as he was acting in his capacity as General Secretary of the UGSS. He rejected the appeal on the grounds that the Circular had been validly issued. The proposed measures contained in the Circular had been discussed with the staff representative bodies, including the UGSS, as early as October 2014. Consultations and negotiations had taken place as required under Staff Regulation 301.8.1 and Staff Rules 302.8.2 and 302.8.3 and under the Recognition Agreement. Moreover, the reasons for the proposed measure had been fully explained to the staff representatives. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision, to withdraw the Circular and to order the FAO to follow the consultative process as set out in relevant Staff Rules and procedures before issuing a revised version of the Circular. He claims moral damages specifying that the amount granted would be returned to the UGSS. He seeks an award of costs, and any relief the Tribunal deems necessary, just and fair.

The FAO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant impugns the Director-General's 2 February 2018 decision to reject his August 2015 internal appeal in its entirety. The complainant had filed his internal appeal against the Organization's decision to introduce, with immediate effect, an overall limit of 55 months on the maximum length of employment possible under short-term appointments governed by Section 316 of the Manual, through the publication of Administrative Circular No. 2015/07. The complainant was not personally affected by that Circular, but his appeal was considered receivable insofar as he filed it in his capacity as a member of the SMCC and as serving General Secretary of the UGSS.

2. In its report, dated 25 September 2017, the majority of the members of the Appeals Committee noted in their deliberations that the parties agreed that consultations with the staff representative bodies

were required, and had taken place with regard to the original proposal on the 55-month rule, but that the parties "disagree[d] as to whether consultations on the amended 55-month rule as presented to the SRBs on 5 March 2015 were required". It noted that "[w]hereas under the original proposal the aggregate period of 55 months would have been calculated to start for existing short-term personnel on the day when the 55-month rule would have come into force, the amended 55-month rule as issued through [the Circular] counts all months of short-term appointments of existing short-term staff, including the months prior to the coming into force of the 55-month rule." It underlined that pursuant to Staff Rule 302.8.3 "the Director-General shall, before issuing administrative instructions or directives on matters relating to terms and conditions of employment or affecting the welfare of the staff, consult the recognized staff representative body or bodies concerned and shall take due account of their comments". It further noted that in order to be considered a proper consultation, there must be a real exchange of views, good faith must be demonstrated, and the relevant staff representative bodies must be "timely and fully informed of proposed instructions" and must be given the opportunity to consult internally on all necessary information so that they may "provide informed comments for the Organization to take into due account". Taking that into consideration, the majority found that "[t]he consultations held on the original 55-month rule did not put the SMCC in such a position that it could give an informed opinion on the amended 55-month rule. The *immediate* effect on existing short-term personnel could obviously not be considered when the consultations on the original 55-month rule were held. While the amendment to the 55-month rule may not have changed it '*in substance'*, as the Organization argues, its effects on employment conditions of existing short-term personnel of the Organization were, in the Appeals Committee's view, drastically different from the effects the originally proposed 55-month rule would have had" (original emphasis). It found that "[t]he measures taken by the Organization in the follow-up to the issuance of [the Circular], in particular the extensions of contracts until 31 July 2015 for those individuals who had already accumulated 55 months of aggregate service at the time of issuance of the [Circular], indicate the type of effects and potential responses fully informed

and open consultations on the amended 55-month rule could have anticipated". It did not find that the meeting of 5 March 2015 fulfilled the requirement for consultation. The majority thus recommended that the Circular be withdrawn and that, "[u]nless proper and meaningful consultations on the amended 55-month rule were held following the issuance of [the Circular] and prior to the adoption of current Manual paragraphs 316.2.57 and 316.2.58", the application of those paragraphs be suspended until proper and meaningful consultations had taken place. It recommended that all other claims be dismissed.

3. In the impugned decision, dated 2 February 2018, the Director-General rejected the complainant's appeal in its entirety as unfounded. He justified his decision on the grounds that the Appeals Committee "erred in concluding that the consultations held between Management and the [staff representative bodies] regarding the introduction of a 55-month limit on short-term appointments did not allow [those bodies] to have an '*informed opinion*' on the matter". He stated, inter alia, that the SMCC meeting of 5 March 2015 involved "a further exchange of views on the proposed measure", including the new amendment regarding the starting date for the calculation of the 55 months, and that the provisions of Staff Regulation 301.8.1, Staff Rules 302.8.2 and 302.8.3, and paragraph 2.2 of the Recognition Agreement did not "require consultation on every aspect of a proposal, nor [did] they require agreement when the final decision rest[ed] with the Director-General". He also noted that the Appeals Committee had failed to properly evaluate whether the "emergency exception" in Staff Rule 302.8.3 applied, as it did not consider the urgency for implementing the measure, and specified that the primary reasons for the immediate effect of the Policy were "to discontinue the Organization's long-standing practice of using short-term appointments to respond to long-term needs, which was not only inappropriate for those hired under such appointments, but also exposed the Organization to legal risks insofar as such appointments might be regarded as a misuse of the [Manual Section] 316 provision". He went on to state that "to give effect to the new measure for the first time only in 2021 would have significantly and unnecessarily protracted a difficult and inappropriate situation for the Organization".

4. The present complaint is based primarily on the grounds that the Organization violated the Staff Regulations and Rules, the Recognition Agreement, and the ICSC Standards of Conduct for the International Civil Service. The complainant submits that the Organization: failed in its obligation to fully consult with the staff representative bodies, particularly the UGSS, on the "critical issue" of the immediate implementation of the 55-month rule; acted in bad faith; presented no element which could be considered an "emergency" justifying an exception to the consultation requirement under Staff Rule 302.8.3; and violated the principle of *tu patere legem quam ipse fecisti*.

5. The Circular provides as follows:

> "It has been decided to introduce an overall limit to the maximum length of employment possible under short-term appointments governed by Manual Section 316.
>
> Thus, holders of short-term appointments in the General Service and Professional categories may not be re-employed by FAO under this same type of appointment once they reach a total, aggregate period of 55 months of service with FAO.
>
> Please note that this decision has immediate effect and applies to both current and previous holders of short-term appointments with FAO.
>
> Appropriate changes to the Administrative Manual will be issued shortly."

6. The relevant Staff Regulations provide as follows:

Staff Regulation 301.8.1

> "In accordance with the principle that the staff has the right to organize for the purpose of safeguarding and promoting its interests, one or more representative staff bodies recognized by the Director-General shall maintain continuous contact and negotiate with the Director-General with respect to the terms and conditions of employment of the staff and general staff welfare."

Staff Regulation 301.8.3

> "The Director-General may, in agreement with recognized staff bodies, establish joint administrative machinery with staff participation to advise him regarding personnel policies and general questions of staff welfare and to make to him such proposals as it may desire for amendment of the Staff Regulations and Rules."

7. At the material time Staff Rule 302.8 on staff relations provided as follows:

> "302.8.1 RECOGNIZED STAFF REPRESENTATIVE BODIES. [...] The following staff representative bodies have been recognized by the Director-General:
>
> (a) the Association of Professional Staff;
>
> (b) the Field Staff Association;
>
> (c) the Union of General Service Staff.
>
> 302.8.2 CONSULTATION. Consultation and negotiation between the Director-General and recognized staff representative bodies shall be carried out in accordance with Staff Regulations 301.8.1 to 301.8.13 and the recognition agreements in force with the body or bodies concerned.
>
> 302.8.3 CONSULTATION ON DRAFT INSTRUCTIONS. Except in emergency situations, the Director-General shall, before issuing administrative instructions or directives on matters relating to terms and conditions of employment or affecting the welfare of the staff, consult the recognized staff representative body or bodies concerned and shall take due account of their comments."

8. Section 2 of the Recognition Agreement relevantly provides as follows:

> "2. Recognition
>
> 2.1 The [UGSS] is recognized under the provisions of Staff Regulation [301.8] as representing General Service staff members in FAO and WFP serving at Headquarters, and such other General Service staff members in the Regional Offices or the Field as may be agreed between the Union and the Organization. Except as may be otherwise agreed upon between the Union and the Organization, any agreement entered into by the Union and the Organization will be applied to all staff in the category concerned. Such recognition is granted for the purposes of consultation and negotiation with the Organization under the provisions of Staff Regulation [301.8].
>
> 2.2 The Organization confirms the right of the [UGSS] to consult, be consulted, and negotiate with it on all aspects of the terms and conditions of employment of General Service staff and on any other matters which shall be jointly agreed as a suitable matter for negotiation/consultation."

9. Section 304 of the FAO Manual concerning the ICSC Standards of Conduct for the International Civil Service provides, in relevant part, as follows:

> "Staff-management relations
>
> 30. An enabling environment is essential for constructive staff-management relations and serves the interests of the organizations. Relations between management and staff should be guided by mutual respect. Elected staff representatives have a cardinal role to play in the consideration of conditions of employment and work, as well as in matters of staff welfare. Freedom of association is a fundamental human right and international civil servants have the right to form and join associations, unions or other groupings to promote and defend their interests. Continuing dialogue between staff and management is indispensable. Management should facilitate this dialogue."

10. The parties agree that the complaint is receivable *ratione personae*, insofar as the complainant has filed his complaint in his capacity as General Secretary of the UGSS, and *ratione materiae* with regard to the claim that the Organization breached its obligation to consult with the UGSS prior to the issuance of Administrative Circular No. 2015/07. The Tribunal agrees.

11. The complaint is receivable insofar as the complainant is acting in his capacity as General Secretary of the UGSS and member of the SMCC and insofar as his complaint relates to the Organization's alleged breach of its obligation to consult in good faith with the staff representative bodies prior to issuing the Circular.

12. The complaint is well founded. As recognized by the majority of the members of the Appeals Committee, the amendment to the proposed 55-month rule, that is, its immediate application rather than the originally proposed application, was "drastically different from the effects the originally proposed 55-month rule would have had". Changing the proposal to provide for an immediate application resulted in a significant number of staff members holding a temporary appointment being affected. The majority of the members of the Appeals Committee observed that "[t]he measures taken by the Organization in the follow-up to the issuance of [the Circular], in particular the extensions of

contracts until 31 July 2015 for those individuals who had already accumulated 55 months of aggregate service at the time of issuance of the [Circular], indicate[d] the type of effects and potential responses fully informed and open consultations on the amended 55-month rule could have anticipated". The majority noted "that on 5 March 2015, the SMCC discussed the amended [...] 55-month rule. However, neither the [complainant] nor the Organization submit[ted] that these discussions were 'consultations', as required by Staff Rule 302.8.3". The majority did not consider that the meeting of 5 March constituted a "proper and meaningful consultation", and it noted also that the "UGSS, according to the SMCC summary record, had informed Management on 5 March 2015 that it '*was not aware of how many temporary staff would be immediately affected by the new rule on the retroactive limitation of short-term employment to 55 months, and asked to receive the numbers of [the General Service staff] that would be touched and risk to be separated by the Organization*'. This information, in the [majority's] view, would indeed have been useful, in fact, it was crucial to assess the effects of the amended 55-month rule on existing short-term [...] staff [in the General Service category]. However the information was not made available." The Tribunal finds these considerations to be correct.

13. The Tribunal finds that by informing the staff representative bodies, at the 5 March meeting, of the decision to proceed with the introduction of the new Policy through the publication of the Circular on 6 March, the Organization was essentially presenting them with a *fait accompli*. Contrary to the Director-General's view that the consultation process preceding the issuance of the Circular was appropriate, the Tribunal finds that it was insufficient, as a proper consultation must allow a reasonable amount of time for the consulted body to discuss the issue, have its principal questions answered and provide reasoned advice or recommendations, and must also allow time for the deciding authority to take that advice into consideration prior to taking the decision. In Judgment 380, under 21, the Tribunal stated: "Where there is only a simple obligation to consult, the decision-maker's duty is to listen or at most to exchange views. The object of the consultation is that [she or] he will make the best decision and the assumption is that

[she or] he will not succeed in doing that unless [she or] he has the benefit of the views of the person consulted. The object of negotiation on the other hand is compromise. This object would be frustrated if either party began with the determination not to make any concession in any circumstances, just as the object of consultation would be frustrated if the decision-maker began with a determination not to be influenced by anything that might be said to [her or] him. On both these hypotheses there would be a lack of good faith."

14. While the Tribunal acknowledges that the Organization was attempting to respond to the abusive situation regarding the use of short-term contracts to address long-term needs, the Tribunal does not find that the Organization has proved that "emergency" circumstances existed which would justify the lack of proper consultation of the staff representative bodies regarding the final amendment presented on 5 March 2015. The Tribunal is not persuaded that the only options were either an immediate application or an application which would have had effect only in 2021. In any case, the Organization has not demonstrated that it was facing current legal challenges that required an immediate rectification of its long held policy of using short-term appointments. With proper consultations with the staff representative bodies, it is possible that alternative dates of application could have been found which would have allowed for a more efficient and agreeable solution. In light of the above considerations, the decision of 2 February 2018, and Administrative Circular No. 2015/07 dated 6 March 2015, must be set aside. The complainant seeks an order that the FAO follows the consultative process as set out in relevant Staff Rules and procedures before issuing a revised version of the Circular. While the FAO has a duty to consult properly with the staff representative bodies in the event that it decides to issue a new Circular, it is not within the Tribunal's competence to make the requested order.

15. The Tribunal finds that the complainant has proved that the Organization showed bad faith by denying the UGSS its right to be consulted, in accordance with the Recognition Agreement and the Staff Regulations and Rules cited above. Presenting the SMCC with a

pre-determined decision instead of providing for a proper consultation, and then later choosing to deal with the affected staff members on a case-by-case basis undermined the reputation, competence, and authority of the SRBs. However, according to consistent case law, the complainant, acting as a staff representative, is not entitled to an award of moral damages (see Judgments 3258, under 5, 3522, under 6, and 3671, under 5). He is entitled to costs, which the Tribunal sets at 3,000 euros.

DECISION

For the above reasons,

1. The decision of 2 February 2018, and Administrative Circular No. 2015/07 dated 6 March 2015, are set aside.
2. The FAO shall pay the complainant costs in the amount of 3,000 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 30 October 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ