

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

## FORTY-EIGHTH ORDINARY SESSION

In re WALSH

Judgment No. 484

### THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Food and Agriculture Organization of the United Nations (FAO) by Miss Catherine Margaret Walsh on 28 January 1981, the FAO's reply of 9 April, the complainant's rejoinder of 21 May and the FAO's surrejoinder of 25 June 1981;

Considering the applications to intervene filed by Miss Monica Walsh on 22 April and by Miss Margaret Foley on 16 September, the FAO's observations thereon dated 19 May and 7 October respectively, and Miss Foley's further letter of 29 October 1981;

Considering Article II, paragraphs 1 and 5, of the Statute of the Tribunal, FAO Staff Regulation 301.1, FAO Staff Rules 302.3091, 302.405, 302.4061, 302.40631, 302.7111 and 303.28 and FAO Staff Rules 302.40611 and 302.40621 as in force up to 31 January 1975;

Having examined the written evidence, 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, an Irish citizen, sent an application for an appointment from her home in Galway to FAO headquarters in Rome on 17 January 1975. She travelled to Rome to take a test in April and was given an appointment as a G.3 stenographer from 19 May to 18 July 1975. She had her appointment extended and now holds a "continuing" appointment as a G.4 clerk-stenographer. On 29 May 1979 she appealed to the Director-General under Staff Regulation 301.11 claiming refund of her travel expenses and of the cost of transporting her effects from Galway and payment of the home leave, repatriation and other entitlements of an official with "non-local" status. On 22 August the Assistant Director-General for Administration and Finance replied dismissing her appeal on the grounds that she had gone to Rome in 1975 on her own initiative, that she did not qualify as a non-local official under Staff Rule 302.40631 <sup>(1)</sup> since she had been recruited after 31 January 1975, and that she was therefore not entitled to any of the benefits of "international recruitment". Meanwhile, on 27 July 1979, the complainant had appealed to the Appeals Committee, which reported on 14 July 1980. The majority of the Committee held that she was not entitled to non-local status or to payment of travel and transport expenses on appointment and on separation. It found that the justification for the exceptional grant of such entitlements to a few non-Italian General Service category staff members was absent in this case: each of them had been sent a written offer of appointment at their place of residence outside commuting distance of Rome. whereas the complainant had not. By a letter dated 22 September 1980, which she received on 30 October, the complainant was informed that the Director-General rejected her appeal. That is the final decision she impugns.

B. The complainant believes it absurd to contend that she was not internationally recruited since correspondence over her recruitment took place between Rome and her home in Ireland. She has been unfairly and arbitrarily treated since, although the FAO informed her in 1975 that it no longer paid the entitlements of internationally recruited staff, twelve stenographers and secretaries recruited from the United Kingdom, whom she names, have been given those entitlements. So have others since recruited from France, Spain and the United Kingdom. As the dissenting member of the Appeals Committee observed, it is dishonest to pretend that she was resident in Rome on recruitment. Staff Rule 302.40631 gives a false definition of non-local staff and the practice of recruiting "local" staff from outside Italy has never been endorsed in the rules, no doubt because it is at odds with the policy of the United Nations common system. The complainant invites the Tribunal to order the FAO to reimburse her travel expenses and the costs of transport of her personal effects and to pay her the installation allowance either at the date on which she joined the staff - with payment of interest - or at the present rate, and repatriation entitlements.

Furthermore, if in the Tribunal's view the change in recruiting policy introduced on 1 February 1975 creates inequality in the treatment of non-Italian staff who travelled from abroad to join the FAO, she claims non-resident's allowance and home leave entitlements.

C. In its reply the FAO invites the Tribunal to dismiss the complaint as unfounded. Until 31 January 1975 all non-Italian General Service category staff other than short-term staff, wherever recruited, had non-local status under former Staff Rules 302.40611 and 40621. Those rules were repealed with effect from 1 February 1975 and further to a decision taken by the FAO Council in November 1974 that all General Service category staff, whatever their nationality and wherever recruited, should be "local". Under the new rule, 302.40631, only those recognised at 31 January 1975 as non-local and in continuous service since then should be treated as such and receive the entitlements set out in Appendix A to the Staff Rules, which include non-resident's allowance; home leave, repatriation grant and travel expenses upon separation. The policy of engaging as "local" staff those who come from abroad has therefore been written into the rules, which plainly disqualify the complainant for non-local status since she was not even on the staff at 31 January 1975. Whatever the recruitment policy of the common system may be - and practice varies - it is only by the FAO rules that the validity of her claims can be determined. Nor is there any breach of the principle of equality of treatment in a difference in status between those recruited before and those recruited after 1 February 1975: to hold that there was would run counter to the notion of acquired rights. Another new rule, 302.7111(i), provides that staff may get travel expenses on appointment either (a) if they are "internationally recruited" and "not residing within commuting distance of the duty station", or (b) "when, in the view of the Director, Personnel Division, such payment is required in order to recruit them". If they qualify under that rule, they are also entitled to installation allowance under Staff Rule 302.3091, travel expenses upon separation under Staff Rule 302.7111(vi) and repatriation grant under Staff Regulation 301.16. But the term "internationally recruited", as applied to the General Service category, refers solely to those with non-local status on 31 January 1975, and the reply to the complainant's application of 17 January 1975 stated that the FAO would not pay expenses of travel to Rome to take a test. No offer of appointment was sent to her home in Ireland. The appointment she signed on 21 May 1975 was addressed to her "c/o FAO headquarters" and her induction form, 'which she also signed, gave Rome as her residence for administrative purposes. Nor does she deny awareness of the rules. She applied for the benefits only when she heard that others had got them. The twelve she names were recruited on a Personnel Division mission to the United Kingdom and were therefore correctly given the benefits. Her contention that Staff Rule 302.7111(i)(b) has been arbitrarily applied is not borne out by the facts: the benefits have been granted only in a few clearly defined cases. Her allegations of inequality are unfounded. Her situation is different from that of staff members recognised as non-local on 31 January 1975 and of those recruited since and given the benefits. As the Tribunal has held, while like circumstances call for like treatment, different ones justify different treatment.

D. In her rejoinder the complainant cites Staff Rule 302.40611, which reads: "General Service staff shall be recruited from outside commuting distance only when it is not possible to secure qualified persons within commuting distance". She contends that her recruitment was based on communication between Rome and her home in Ireland - a place "outside commuting distance" - even though she took the test in Rome. The definition in Staff Rule 302.7111(i)(a) of "internationally recruited" staff is not confined to the Professional category or to those recruited before 1 February 1975. The FAO has been recruiting General Service category staff internationally since that date and should give the phrase its natural interpretation, viz. recruitment from one country to another. As for the interpretation the FAO puts on Staff Rule 302.7111(i)(b), two of those she has named as receiving benefits paid their own travel and installation expenses, and it is difficult to see how the Director of Personnel concluded that payment was "required in order to recruit them". For example, in a letter addressed on 11 December 1978 to a Miss Warren, who had claimed travel and other expenses, the FAO said it was "prepared to make an exception" to the rule and pay her all the benefits. The case of a Miss Hertz was similar. How can the Director of Personnel be fair in exercising his discretion when there are no objective standards? The application of the rule has in fact been arbitrary. Like others now receiving the benefits, the complainant travelled from abroad to join the FAO, and she is entitled to the same treatment as they. As for the circumstances of her recruitment, what she was told was that she would not be paid the expenses of travel to Rome to take the test, not that she would be refused them if appointed. The FAO enticed her to Rome. Her appointment was addressed to her "c/o FAO headquarters" precisely because she had no residence in Rome. She accordingly presses her claims for relief.

E. In its surrejoinder the FAO points out that it did not need to offer the complainant travel expenses and other benefits in order to recruit her, since she came to Rome of her own accord and at her own expense, without even the assurance of a vacancy. The process of recruitment was not carried on between Rome and Ireland: no offer was ever made outside the duty station, and she was not "enticed" to Rome: the reply to her application was "non-

committal". Recruitment is based on a contract between the parties, and before she arrived in Rome no contract had been concluded. As to the term "internationally recruited", the Staff Rules apply it only to staff in the Professional and higher categories and to General Service category staff recognised as non-local under Staff Rule 302.40631. For all other staff the grant of the benefits is discretionary. The few who have been granted them were recruited abroad either because they had special language qualifications, or for some special type of work, or by FAO recruiting missions abroad. There is no evidence to show that the Director of Personnel exercised his discretion under Staff Rule 302.7111(i)(b) arbitrarily. Miss Hertz and Miss Warren were treated as exceptions because it was later found that, unlike the complainant, they had gone to Rome after, and as a result of, receiving an offer of appointment. There has therefore been no breach of the principle of equality. The FAO again invites the Tribunal to dismiss the complaint as unfounded.

#### CONSIDERATIONS:

The claim for repayment of travel and transport expenses, installation allowance and repatriation grant

1. The complainant cites Staff Rule 302.7111(i)(a) in support of her claim. The Tribunal will therefore first consider her submissions in the light of that rule. But it will also take account proprio motu of Staff Rule 302.7111(i)(b) and comment on the question of its applicability.

(a) According to Staff Rule 302.7111(i)(a) the FAO shall pay the travel expenses incurred on initial appointment by "internationally recruited" staff members who at the time of appointment were not residing within commuting distance of the duty station. Staff Rule 303.28 defines "commuting distance" as the distance within which a staff member can conveniently travel each day between the place of residence and the place of work. But the Tribunal need not consider whether at the time of her appointment the complainant was resident within commuting distance. The plea will fail if she was not "internationally recruited" within the meaning of Staff Rule 302.7111(i)(a).

She argues that the words should be given their normal and natural meaning: since she was resident outside Italy at the time of appointment she had to change residence from one country to another to take up her duties in Rome, and her recruitment was therefore "international".

The FAO submits that she was not "internationally recruited". Its argument runs: the words denote only, Professional and higher category staff and General Service category staff with non-local status; under Staff Rule 302.40631 a General Service category staff member is non-local only if recognised as such on 31 January 1975 and in continuous service since; the complainant became a General Service category member after 31 January 1975 and has never held non-local status; and she was therefore not "internationally recruited".

If these words stood by themselves the complainant's argument might well be preferred to the FAO's, but they must be interpreted in their context in the Staff Rules. There are two reasons why the FAO's view is preferable. First, it is based on Staff Rule 302.405, which states that all Professional and higher category staff are "internationally recruited", and on Appendix A to the Staff Rules, which describes as "internationally recruited" the non-local staff in the General Service category. Secondly, only the FAO's view will square with Staff Rule 302.40631, the effect of which is that, not having held non-local status on 31 January 1975, the complainant is a local staff member. It would be inconsistent to treat a staff member as both local and "internationally recruited". Staff Rule 302.7111(i)(a) therefore does not apply.

(b) Staff Rule 302.7111(i)(b) says that the FAO shall also pay the travel expenses of other staff when, in the view of the Director of Personnel, such payment is required in order to recruit them. The complainant's claims fail under this head as well.

She volunteered her services. She received an application form, filled it up and sent it back on 17 January 1975. On 18 March 1975 the FAO informed her that to qualify for appointment she would have to pass a test in Rome, but that her travel expenses would not be repaid. On 22 April she passed the test and on 19 May was granted a two-month appointment.

Thus not only did she offer her services, but she took a test of her own accord, knowing full well that she would have to pay the expenses herself. Nor did she make repayment of any of her expenses a condition of her acceptance of appointment. Thus it cannot be said that the payment she is now claiming was required in order to recruit her, and Staff Rule 302.7111(i)(b) is also inapplicable.

The complainant argues that in so far as the application of the rule depends on the view taken by the Director of Personnel it may be arbitrary. The point need not be settled, but in fact it is mistaken. The Director of Personnel does enjoy some discretion under the rule, but he cannot exercise it as he pleases: he has to consider in each case whether or not payment was required in order to recruit, and the exercise of his discretion is subject to review by an administrative as well as by a judicial body.

2. The complainant's second objection is that she was not given the same treatment as other staff members who received under Rule 302.7111(i)(b) the benefits she was refused. The FAO answers that the circumstances in which the others were appointed warranted applying the rule in their favour.

As the Tribunal finds below, although the complainant was treated differently in law, the facts of her case were different, and there was therefore no breach of the principle of equality.

(a) The FAO granted the benefits provided for in Staff Rule 302.7111 and other rules to staff members who had special skills such as a knowledge of Chinese or Arabic, or who - for example Mr. Goolamallee - were to do specialised work. There is keen demand for such staff, and they would probably not have gone to Rome had they not been led to expect the benefits they received. Moreover, Mr. Goolamallee was given a formal promise of repayment, and that made his claim even stronger. The staff whom the complainant regards as privileged were needed to provide special services, and since they were not in the same position there were grounds for different treatment.

(b) From 1977 the FAO sent missions abroad to recruit staff whom it could not find in Italy. Unlike the complainant, they were invited to join the staff and had not already volunteered their services. It was therefore only reasonable for them to expect the benefits the complainant was refused.

(c) Lastly, staff members such as Miss Warren and Miss Hertz received offers of employment from the FAO while they were resident abroad. They had a reasonable expectation of repayment of their travel expenses and of other benefits. They were therefore in a position which was similar to that of staff recruited by missions and which was therefore different from the complainant's. Miss Warren and Miss Hertz were granted the benefits, not on appointment, but only after claiming them. But the complainant is mistaken in inferring that it was wrong to grant them. The text of the correspondence submitted in evidence shows that there was delay over paying the benefits because of ambiguity in the offer of appointment.

The application for non-resident's allowance and home leave

3. Should the Tribunal hold that the FAO's recruitment policy is contrary to the principle of equality, the complainant claims the non-resident's allowance and home leave enjoyed by nearly 600 General Service officials as non-local staff. Contrary to what she contends, the Director-General kept within the bounds of his authority in adopting the policy which is, moreover, embodied in Staff Rule 302.40631. The rule says that a non-local staff member is a staff member in the General Service category who was recognised at 31 January 1975 as a non-local staff member under the Staff Rules then in force and has since remained in continuous service. A contrario, a General Service category staff member who does not fulfil The conditions in Staff Rule 302.40631 has local status.

It is mistaken to argue that the FAO's recruitment policy violates the principle of equality. Staff Rule 302.40631 does, by implication, prescribe local status for all General Service category staff appointed on or after 1 February 1975, and so puts them on a par. But it is to be read together with Staff Rules 302.7111(i) and (vi) and 302.3091 and Staff Regulation 301.16, which allow for the grant of special benefits to such staff when required in order to recruit them. Thus the Staff Rules make a distinction between groups of General Service category staff members. The desirability of the distinction may be open to question, but it is enough to defeat any allegation of inequality.

The applications to intervene

4. Since the complaint is dismissed, so too are the applications to intervene, and there is no need to consider whether they are receivable.

DECISION:

For the above reasons,

The complaint and the applications to intervene are dismissed.

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

Delivered in public sitting in Geneva on 3 June 1982.

(Signed)

André Grisel

J. Ducoux

Devlin

A.B. Gardner

1. The rule reads: "A non-local staff member shall be a staff member in the General Service category who was recognised at 31 January 1975 as a non-local staff member under the Staff Rules then in force and has since remained in continuous service".