Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

R.

v.

FAO

138th Session **Judgment No. 4857**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. R. R. against the Food and Agriculture Organization of the United Nations (FAO) on 30 December 2020 and corrected on 12 April 2021, the FAO's reply of 20 April 2022, the complainant's rejoinder of 9 May 2022, corrected on 12 May 2022 and supplemented on 30 May 2022, the FAO's surrejoinder of 9 August 2022, the complainant's additional submissions of 9 November 2022, supplemented on 24 November 2022, the FAO's comments thereon of 20 January 2023, the complainant's further additional submissions of 19 February, 26 February, 2 March and 9 March 2024, and the FAO's final comments thereon of 14 March 2024;

Considering the documents produced in response to the Tribunal's request for further submissions of 1 February 2024;

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

Having examined the written submissions;

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

The complainant submits that the Organization committed serious misconduct that breached his rights and considers, in particular, that he was subjected to harassment.

The complainant was engaged by the FAO as a national consultant in organisation and administrative support for the locust control campaign, at the FAO Representation in Madagascar, from 1 June 1997 to 11 January 1998.

By a letter dated 28 September 2020, addressed to the FAO Director-General care of the office of the Representation in Madagascar, the complainant submitted a "[r]equest for the settlement of [a] dispute by mutual agreement, or submission to arbitration, or, failing that, waiver of the Organization's jurisdictional immunity"[*]. He recounted a series of incidents that he described as acts of "moral harassment, intimidation, sabotage and slavery-like humiliation, driven by a desire to do harm"[*] committed by international consultants assigned to the FAO programme for which he had worked in 1997 and 1998, and alleged that a negative assessment of his performance had remained in his professional file, purportedly resulting in his "permanent elimination from both the FAO and [...] the United Nations System"[*].

On 30 December 2020 the complainant filed the present complaint with the Tribunal. He was invited by the Registrar to correct and supplement it by adducing, in particular, a copy of the terms of his appointment at the material time.

By emails dated 19 February and 16 March 2021 to the FAO Representative in Madagascar, the complainant requested a copy of the contract in question. He was informed on 8 April 2021 that, owing to the length of time that had passed since the events, the office no longer had the document requested in its files.

The complainant asks the Tribunal to "[t]ake formal note of the presumption of fact [...] that a damaging impediment to his career currently exists in the inviolable archives of the FAO"[*], to "[l]ift the inviolability of the inviolable archives of the FAO"[*] and to "[t]ake formal note in inquisitorial proceedings of the existence in [his] classified file [...] in the inviolable archives of the FAO [...] of [s]erious [m]isconduct committed continuously against him since 1998 until the present"[*] He also requests the setting aside of the implied decision to

[*] Registry's translation.

reject his prior claim for compensation, the "[u]rgent cessation of the [b]reach [of his] [r]ight [...] to [w]ork according to his calling"* and compensation for the material injury he considers he has suffered, in the amount of 156,384 United States dollars. In his rejoinder, the complainant further seeks moral damages and costs, without specifying the amounts in question.

The FAO asks the Tribunal to declare that it is not competent to hear the complaint or, subsidiarily, to dismiss the complaint in its entirety as irreceivable and, in addition, unfounded.

CONSIDERATIONS

1. The complainant impugns the implied decision of rejection which, according to him, arose under Article VII, paragraph 3, of the Statute of the Tribunal from the FAO's failure to reply to a claim for compensation that he had submitted to it by a letter of 28 September 2020.

That claim was based on alleged serious misconduct, mainly consisting of "institutional moral harassment"*, committed by the Organization against him while he was working as, in his words, an "administrative consultant for the locust control campaign"* for the FAO Representation in Madagascar, from 1 June 1997 to 11 January 1998 – that is around 23 years previously. In particular, he considers that the retention, in the Organization's archives, of information concerning the difficulties he had encountered during that period has impeded his career progress within the entire United Nations system ever since and thereby caused him injury warranting redress.

2. The Organization submits that the Tribunal is not competent to hear the complaint because the contractual status under which the complainant was employed during that period did not confer on him the status of an official and thus precludes him from access to the Tribunal.

* Registry's translation.

This challenge to the Tribunal's jurisdiction, which, by definition, must be dealt with before considering any other issue, is extremely serious in this case.

3. Under Article II, paragraph 5, of its Statute, "[t]he Tribunal shall [...] be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials" (emphasis added). The Tribunal's competence does not therefore extend to complaints filed by individuals who do not have the status of officials in organisations that have recognised its jurisdiction (see, for example, Judgments 4652, consideration 11, 4646, consideration 3, 3705, consideration 4, 3551, consideration 3, and Judgment 3049, consideration 4).

4. In the present case, the parties vehemently disagree as to whether the complainant was an official of the FAO for the purposes of aforementioned Article II, paragraph 5.

According to the FAO, the complainant was hired locally under a personal services agreement (PSA), a contract governed by Section 319 of the FAO Manual, that does not confer the status of official on the holder.

It transpires from a request for further submissions, ordered by the Tribunal, seeking the production of the provisions of the Manual applicable at the material time, that the Organization in fact intended to refer to an appointment under a special services agreement (SSA) – a type of contract replaced by the current PSA.

It is plain that a person engaged under a special services agreement did not have the status of an FAO official. The aforementioned Manual (in its versions of 13 June 1994 and 9 October 1997, which were successively applicable while the complainant was employed and whose wording was identical in so far as the provisions examined here are concerned) provided, in paragraph 319.11, that a holder of such a contract, referred to as a "subscriber", "is in no way considered to be a staff member of the Organization" and, in paragraph 319.12, that "[t]he Staff Regulations and Staff Rules [did] not apply to subscribers".

Moreover, paragraph 319.25 provided that any dispute between the parties to a special services agreement would be settled by arbitration – in a procedure involving the establishment of a panel of three arbitrators – thereby precluding the Tribunal's jurisdiction in this area.

The complainant categorically denies that he was engaged under such a contract and essentially submits, in response to the Organization's challenge to jurisdiction, that he was in fact employed as a consultant. It is correct that, owing to a specific feature of the law applicable to human resources at the FAO, its "consultants", the rules applicable to whom are set out in Section 317 of the Manual, are to a certain extent treated as officials and, as such, have access in particular to internal appeals procedures and the Tribunal (see for example, for a reminder of these rules, Judgment 3483 or, for their implicit confirmation, Judgment 4228).

5. A dispute of fact such as that between the complainant and the Organization should normally be easily settled by examining the contract in question. However, the present case is notable in that this contract is not in the file before the Tribunal, as both parties have stated that they are unable to produce a copy of it.

The complainant asserts that he is not in possession of the contract which, according to him, was drawn up solely in electronic form, without the Organization giving him a copy of it at the time of his appointment. When the complainant was invited by the Registry of the Tribunal, in a request for the complaint to be corrected, to submit a copy of this document, he asked the FAO Representation in Madagascar to provide one. However, by an email of 8 April 2021, he was informed by the office of the Representation that "in view of the age of the file, multiple changes of [the IT] systems [in use] and [that] office's archiving policy, [it] no longer [had] a copy of the document [...] requested in [its] files"[*], with the result that it was physically impossible to fulfil that request. The Organization confirms, in its submissions to

[*] Registry's translation.

the Tribunal, that "the contract concluded with the complainant [...] could not be found in the Representation's archives"[*].

6. The only official document submitted as evidence of the contested contractual relationship is in fact a work certificate, issued by the FAO Representative in Madagascar on 11 February 1998 – shortly after the complainant left the Organization – confirming that he "[had] performed the role of [n]ational [c]onsultant in [o]rganisation and [a]dministrative support for the locust control campaign at the FAO"[*] during the period in question.

The complainant submits that, by its very nature and wording, this certificate confirms that he was employed by the Organization as a consultant. However, on the basis of the information provided to it by the Representation in Madagascar regarding the latter's practices in this area, the Organization argues that, on the contrary, the reference in such a certificate to the status of "national consultant" must be understood as referring to that of a holder of a PSA – or, more exactly, under the provisions in force at the time, of an SSA – concluded at the local level. Moreover, it is apparent from the Organization's submissions that it is precisely on the content of this certificate that the defendant bases its assertion that the complainant was engaged under this type of contract.

7. While the context of uncertainty inevitably created by the absence of a copy of the contract in question in the file can only be deplored, three sets of considerations will lead the Tribunal to decline jurisdiction to hear this case.

8. Firstly, it should be recalled that, as the Tribunal has always made clear since its earliest judgments, its jurisdiction is limited and, as such, it is "bound to apply the mandatory provisions governing its competence" (see Judgment 67, consideration 3, cited in particular in Judgments 4540, consideration 4, 4458, consideration 12, and 2657,

[*] Registry's translation.

consideration 5). It follows that the Tribunal cannot rule on a complaint before it unless its competence to hear it has been clearly established.

Of course, it is ordinarily the complainant's responsibility to establish that competence, and consequently it is for a complainant alleging to be an official of an international organisation to produce the contract signed with that organisation as evidence of that status (see Judgments 2503, consideration 4, 1964, consideration 3, and 339, consideration 1).

It is true that the organisation concerned must, in normal circumstances, also be able to produce such a contract if required. However, in the specific circumstances of the present case, the Tribunal considers that, contrary to the complainant's submissions, the FAO's inability to supply a copy of the contested contract cannot be regarded as an anomaly. Paragraph 340.5.1 of the Manual on the retention of personnel files provides that these files must be kept for seven years after a staff member leaves the Organization or – in particular in the case of a staff member who resigns, which according to the complainant he did – 17 years. However, the complainant requested the FAO for a copy of the contract in question for the first time only on 19 February 2021, that is more than 23 years after his separation from service. Although the paragraph in question provides that selected papers are to be transferred to microfilm after the aforementioned time limits elapse, the Organization cannot reasonably be blamed for having destroyed the document in the meantime.

Admittedly, the complainant submits, as stated above, that he was not given a copy of his contract at the material time. However, even if this is true, given his intention to complain after leaving the FAO about the conditions under which his employment relationship had taken place, he ought to have requested a copy of the contract within a reasonable time in view of the risk that the retention period for such a document would expire. It is clear that, by waiting 23 years to do so, the complainant has not satisfied that requirement.

9. In the second place, the Tribunal considers that the aforementioned work certificate of 11 February 1998 does not prove that the complainant was a consultant within the meaning of Section 317 of the Manual.

Firstly, the complainant is wrong to submit that the issuance of such a certificate demonstrates in itself that the FAO considered him at the time to be employed under similar conditions to those applicable to officials. Although the title "work certificate" is certainly not entirely appropriate for attesting to a contractual relationship supposedly amounting to a mere agreement for the provision of services like a PSA or an SSA, it is understandable that it is sometimes used, for convenience, to designate collaborative relationships with an organisation governed by contracts of this type, and the recognition of an employment relationship such as alleged by the complainant cannot therefore be inferred from the existence of a document with this title.

Secondly, the reference in this certificate to performance of the role of "national consultant" cannot be construed – despite its ambiguity – as necessarily referring to the status of consultant governed by Section 317 of the Manual. The Organization's explanations on this point, referred to above, appear persuasive to the Tribunal, and it is apparent from the file that the term "consultant" is generally used at the FAO, in practice, to refer indiscriminately to members of various categories of personnel engaged under contracts that do not confer the status of official, including PSA and SSA holders. The extract from the Handbook for FAO Representatives submitted by the complainant in that regard in response to the aforementioned request for further submissions does not refute these findings, particularly as the Handbook did not, in any event, exist at the material time.

10. In the third and last place, the Tribunal notes that the complainant's written submissions themselves contain several indications that he was not employed as a consultant within the meaning of aforementioned Section 317.

In this respect, it should firstly be observed that the complainant devotes a large part of his submissions concerning the Tribunal's competence to attempting to show that his employment relationship with the FAO was *de facto* that of an official and that the contract which he held should be redefined accordingly. He argues that, in view of the employee/employer relationship that existed between him and the Organization, the nature of the tasks entrusted to him and the actual conditions under which he worked, he was employed under the same conditions as an official and refers, on this point, to the national and international rules of law and case law concerning the possibility of contractual redefinition in situations of this kind. It should be noted that this argument follows a different line of reasoning from his request for recognition as a consultant and would have in fact no logical basis if he had actually been employed in that capacity, as that in itself confers access to the Tribunal.

Moreover, both the complainant's letter to the FAO of 28 September 2020 and his written submissions to the Tribunal show that the allegations of harassment on which he bases his claims against the Organization rest largely on the humiliating and discriminatory treatment to which he considers he was subjected at the material time by various "international consultants" sent to Madagascar by the Organization's Headquarters to work on the programme for which he was employed. The complainant submits that they misused the relative superiority conferred by their status to subject him to such treatment. However, these "international consultants" were, in all likelihood, consultants within the meaning of Section 317 of the FAO Manual and this line of argument in itself makes plain that the complainant was not himself employed in that capacity.

Lastly, the Tribunal notes that, in his letter of 28 September 2020 to the FAO Director-General, the complainant expressly requested that, if the dispute that he intended to raise could not be settled by mutual agreement, it be subject to "submission to arbitration"[*]. However, this means of dispute resolution is not open to officials or consultants within

[*] Registry's translation.

the meaning of Section 317 of the FAO Manual and corresponds precisely, on the contrary, to the one provided for PSA or SSA holders.

11. In these circumstances, the Tribunal considers that the evidence in the file before it inevitably leads it to accept the Organization's argument that the complainant was employed under a special services agreement, and not as a consultant.

As a result, it must be considered that the Tribunal has no jurisdiction to hear the present complaint (see, for similar cases, Judgments 4652, considerations 10 to 22, 4646, consideration 3, 3551, consideration 3, 3049, consideration 4, or 2888, considerations 5 and 6, and, specifically in respect of a holder of special services agreements at the FAO, Judgment 1034, consideration 3).

It should be emphasized that this decision to decline jurisdiction applies not only to the consideration of the complainant's claims based on the various instances of misconduct to which the FAO allegedly subjected him, but also to the examination of the complainant's line of argument, referred to above, seeking to have his employment relationship redefined as that of an official with the very aim of giving him access to the Tribunal. When, as is the case for an SSA – or, now, for a PSA – as referred to in the FAO Manual, jurisdiction to hear disputes is expressly conferred on an arbitral body, a request for a contract to be redefined, which constitutes in itself such a dispute, may be considered by that body alone and the Tribunal cannot rule on that question without overstepping its own jurisdiction (see Judgments 4809, consideration 2, 4652, consideration 17, and 2888, consideration 6).

12. It follows from the foregoing that the complaint must be dismissed in its entirety on the grounds that it has been brought before a court that is not competent to hear it.

13. Moreover, the Tribunal observes that if the complainant had been an official or consultant as he submits, the complaint would in any event be irreceivable – even leaving aside the issues of a time bar raised

by the length of time since the events in question – for failure to exhaust internal means of redress.

The complainant considers that he can impugn before the Tribunal the alleged implied decision of rejection that arose pursuant to Article VII, paragraph 3, of the Statute upon the expiry of the 60-day time limit from the FAO's receipt of his claim for compensation of 28 September 2020. However, under the Tribunal's settled case law, the provisions of Article VII, paragraph 3, must be read in the light of paragraph 1 of that article and are not applicable where the official concerned can use internal remedies, in which case these must be exhausted, as required under aforementioned paragraph 1, before the matter is brought to the Tribunal (see, in particular, Judgments 4760, consideration 2, 4517, consideration 4, or 2631, considerations 3 to 5).

Under paragraph 331.4.1 of the FAO Manual (in the version in force when the claim for compensation in question was submitted), former officials of the Organization have access to the internal means of redress provided for in the Staff Regulations and Staff Rules. Under paragraph 331.1.21, the same applies to consultants employed by the Organization, and it is to be inferred from a combined reading of these two paragraphs that former consultants also have access to them (see, for a similar case involving the successor of a deceased consultant, Judgment 4811, consideration 4).

If the complainant had been employed as an official or a consultant, he would therefore have been required, before referring the dispute to the Tribunal, to follow the internal appeals procedure set out in Section 331 of the Manual, which includes, in particular, bringing the case to the Appeals Committee – unless the Director-General grants an exemption from this stage, which was not even requested in this case. However, the evidence shows that the complainant did not comply with this requirement, with the result that, even on this assumption, the complaint was bound to be dismissed.

14. The complainant has requested oral proceedings, which, according to his wishes, would have included the hearing of two witnesses. However, in view of the Tribunal's lack of jurisdiction as

stated above, which could not, in this case, be challenged at such proceedings and renders pointless any discussion on the merits of the complaint, this request must be dismissed as irrelevant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2024, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

MIRKA DREGER