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

FIFTY-SIXTH ORDINARY SESSION

In re BROCARD

Judgment No. 676

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Food and Agriculture Organization of the United Nations (FAO) by Mrs. Gisèle Brocard on 7 December 1984, the FAO's reply of 21 February 1985, the complainant's rejoinder of 28 March and the FAO's surrejoinder of 13 May 1985;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, FAO Staff Rule 302.40631 and FAO Manual provisions 311, 316, 319 and 331;

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, a French citizen, joined the FAO on 11 July 1974 under a special services agreement.[(1)] This was followed by another which expired on 30 November 1974. She held short-term appointments from 2 December 1974 to 31 October 1975 and then, from 1 November 1975, fixed-term ones, the last being converted as from 1 April 1978 into a continuing appointment. On 21 May 1979 she put in a claim for non-local status and the incidental benefits. On 17 July 1979 she was told that a similar case was before the Appeals Committee and it was suggested that the proceedings be suspended until the Director-General had decided on the other case. She wrote again to the Director-General on 21 September but got no answer. On 20 August 1982 she asked the Director-General to apply to her case the Tribunal's ruling in Judgment 506 (in re Hoefnagels). On 14 September she was told that there were no grounds for reviewing the matter. On 29 October she appealed to the Director-General but had her appeal rejected on 8 February 1983 as time-barred and irreceivable. She appealed to the Appeals Committee on 10 March 1983. On 10 September 1984 the Director-General took his final decision to reject her appeal, and that is the decision she impugns.

B. The complainant seeks to rebut the objections the FAO raised to receivability in the internal proceedings. She submits that she complied with the time limits in Manual provision 331, and observes that indeed the Appeals Committee declared her appeal receivable. She cites examples of claims made in like circumstances which have been treated as receivable.

As to the merits, she contends that it was against the rules to appoint her under special services agreements. Had the rules been properly applied, she ought to have been offered after 12 months' service, i.e. by 10 July 1975, a fixed-term appointment carrying non-local status as from the date of her original appointment. The appointments under the agreements were unlawful, and the treatment of her discriminatory. Her supervisor said he would try to get her a 12-month, fixed-term appointment and that she should take the tests: non-local status would come with the appointment. She passed the tests on 1 October 1974 and also got medical clearance. But she was then offered a contract for only 11 months, and she believes that the purpose was to get out of giving her non-local status, as was then the practice.

She seeks non-local status and the incidental benefits as from 10 July 1975, the date on which she completed 12 months' service, or as from 1 November 1975, the date on which she was granted a fixed-term appointment and 2,000 United States dollars in costs.

C. In its reply the FAO observes that the complainant dropped her internal appeal of 21 September 1979 and therefore failed to press her claims. The examples she cites are irrelevant the FAO may decline to treat a complaint as time-barred if it finds sound reason to review a claim. But it found none in this case. The FAO explains at length why the rulings in the cases of Mrs. Clegg-Bernardi (Judgment 505) and Miss Hoefnagels (506) should not apply. It submits that the Director-General was entitled to appoint the complainant under special services

agreements. It contends that the procedure for appointing her had not begun before the end of October 1974 and that she was given no promise of appointment or of non-local status and no information about the possibility of obtaining such status. She was told merely that the Administration had asked that a post be created and that she might be appointed to it but no one with authority to do so told her she was bound to be appointed or that the appointment would carry non-local status. Her position is quite different from that described in Judgment 506. The FAO submits that her complaint is irreceivable and subsidiarily that it is devoid of merit. Even if the Tribunal found in her favour she should be awarded non-local status only as from the date of her internal appeal of 1982.

D. In her rejoinder the complainant maintains that her supervisor offered her a fixed-term appointment. She was given to understand that once she passed the secretarial tests -- and she did so on 1 October 1974 -- she would be offered a new appointment. She was granted a short-term one dated 2 December 1974 which on 1 November 1975 was converted into a fixed-term appointment with retroactive effect. She ought therefore to have succeeded under the rule formulated by the Tribunal in Judgment 506. She presses her claims.

She develops her arguments on receivability and on the unlawfulness of the special services agreements.

E. In its surrejoinder the FAO enlarges on its contention that the complaint is irreceivable and its subsidiary plea that it is devoid of merit. The complainant s position under the special services agreements until 30 November 1974 which was moreover perfectly lawful was plain enough: she was not a staff member. Accordingly she was not even recruited to the staff before the end of October 1974 was not in the same position as Miss Hoefnagels and may not benefit under the Tribunal's earlier ruling.

CONSIDERATIONS:

Receivability

1. Article VII(1) of the Statute of the Tribunal stipulates that a complaint shall not be receivable unless the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations. It is not enough to exhaust the internal means of redress; the internal time limits must be observed. If the staff member failed to lodge his internal appeal in time his complaint to the Tribunal will be irreceivable.

But the staff member may ask the Administration for review either where some new and unforeseeable fact of decisive importance has occurred since the decision was taken, or else where the staff member is relying on facts or evidence of decisive importance of which he was not and could not have been aware before the decision was taken. If either condition is fulfilled the Administration is under a duty to review, and even if the time limit was originally not respected the new decision will set a new one. The staff member who observes the new time limit may in turn submit a complaint to the Tribunal.

2. The complainant holds her present appointment by virtue of a decision to give her a contract without limit of time as from 1 April 1978, which does not confer the non-local status and benefits she is claiming. It is not in dispute that she failed to challenge in time the decision that took effect from 1 April 1978. She submitted an appeal to the Director-General on 21 September 1979, but he did not answer it, she failed to challenge his implied rejection, and she accordingly dropped the proceedings.

There has, however, been a new and unforeseeable fact of decisive importance since 1 April 1978 on which she may now rely. In Judgments 505 and 506, which it delivered on 3 June 1982, the Tribunal held that the Director-General had adopted a rule in pursuance of decisions taken by the FAO Council in November 1974. The rule draws a distinction between two groups of General Service category staff. Those who held short-term appointments before the end of October 1974 and had or might have been informed of their eligibility for non-local status were to continue to qualify for such status by satisfying certain conditions determined by practice. Those who were appointed later were subject to Staff Rule 302.40631 and were to qualify for non-local status only if they had held it by 31 January 1975 and had since continued in service. Though neither published nor even communicated to the staff as a whole before the Tribunal delivered its judgments, the rule greatly altered the position of staff in the General Service category, and the Tribunal's formulation of it amounted to a new and unforeseeable fact of decisive importance which put the FAO under a duty to entertain a request for review.

After the Tribunal's judgments had come to her knowledge the complainant correctly followed the internal appeal procedure. On 20 August 1982 she submitted a claim to the Director-General, and she repeated it on 29 October. It

was rejected on 8 February 1983, and on 10 March she appealed to the Appeals Committee. On the Committee's recommendation the Director-General finally rejected her claim on 10 September 1974. She has therefore exhausted the internal means of redress, and respected the time limits, and her complaint is receivable.

3. It is immaterial that she was an intervener in the unsuccessful suit filed by Mrs. Clegg-Bernardi. Someone who intervenes in a complaint does so on account of

his interest in the outcome: he may rely on the rights of a successful litigant in whose case he intervenes, but he may still file a complaint of his own even if that case should fail.

Merits

4. The complainant held appointments under what was known as a "special services agreement" from 11 July to 10 October 1974 and from 11 October to 30 November 1974. She held a short-term appointment from 2 December 1974 until 31 October 1975. She held further short-term appointments from 1 November 1975 until 31 October 1977 and from 1 November until 31 December 1977, and she was granted another from 1 January to 31 December 1978. This last short-term appointment was converted into a continuing one as from 1 April 1978.

5. According to the rule stated in Judgments 505 and 506 and set out in 2 above only staff members who had held short-term appointments in the General Service category before the end of October 1974 and had or might have been informed of their eligibility for non-local status continued to qualify for that status, provided they fulfilled the conditions determined by practice. From 11 July to 30 November 1974 the complainant held appointments under a special services agreement. She therefore did not have a short-term appointment at the material time and is not directly covered by the rule.

6. The complainant argues that her appointments under a special services agreement were in breach of the rules, that she should have been granted a short-term appointment instead, and that she is therefore entitled to benefit under the rule as it applies to short-term staff.

In fact it is beside the point whether it was in keeping with the rules to grant her appointments under a special services agreement. As from 2 December 1974 they were succeeded by a short-term appointment, then by fixed-term ones and lastly by a continuing one. They ended long ago, were not challenged while in force, and are beyond challenge now.

The Tribunal would rule otherwise only if they had been tainted with a flaw so serious and flagrant as to make them inoperative or void. But they were not.

Besides, there is no inconsistency in entertaining a complaint which challenges the appointment as from 1 April 1978 yet declining to rule on the correctness of the appointments under a special services agreement. Unlike the earlier appointments, the decision which took effect as from 1 April 1978 is still of legal effect.

7. The point at issue is this. Even though she held appointments under the special services agreement, had the complainant been informed or might she have been of her eligibility for non-local status, or, in other words, did she stand to benefit from the expectations short-term staff members had or might have been given? If the answer is yes, she is entitled under the principle of good faith to the fulfilment of her expectation.

In the circumstances of the case the complainant probably did have good reason to expect non-local status on obtaining a fixed-term appointment. In August 1974 the head of her unit invited her to take tests, and she did so on 1 October. He told her he would propose granting her an appointment for twelve months, i.e. a fixed-term one. On 25 October 1974 he asked her to get medical clearance, and she did so. Thus she might reasonably have inferred from her supervisor's attitude that on being granted a fixed-term appointment she would obtain non-local status. Indeed that such an appointment would carry non-local status was implied by headings on the induction sheet she was asked to sign on 6 December 1974. Accordingly, even though she was employed under the special services agreement, she is entitled to be put on a par with short-term staff and to be granted non-local status on the conditions determined by practice.

It is immaterial that on 2 December 1974 she obtained a short-term appointment for only 11 months, not a fixed-term one for 12: the point is that before the end of October 1974 she had received or might have received a promise of non-local status on obtaining a fixed-term appointment for 12 months.

Nor need the Tribunal consider whether the supervisor with whom she had discussed her prospects was in fact competent to promise her non-local status. She will succeed under the principle of good faith if she had reason to believe that her supervisor was competent to do so. The Tribunal holds that she did.

8. The Tribunal concludes that the complainant is entitled to the same treatment as staff who qualified for non-local status either on completion of 12 months on short-term appointments or on being granted a fixed-term or continuing appointment. The complainant qualified on 1 November 1975, the date on which she was granted a fixed-term appointment, and she is entitled to the benefits of non-local status as from that date.

DECISION:

For the above reasons,

1. The complainant shall be granted non-local status as from 1 November 1975.

2. The FAO shall grant her the benefits of non-local status as from 1 November 1975.

3. The FAO shall pay her 2,000 United States dollars as costs.

4. Her other claims are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 19 June 1985.

(Signed)

André Grisel

Jacques Ducoux

H. Gros Espiell

A.B. Gardner

1. Manual provision 319.1.11 reads: "The holder of a special services agreement is referred to as a 'subscriber'. A subscriber is in no way considered to be a staff member of the Organization".

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