

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

FIFTY-SEVENTH ORDINARY SESSION

In re GROSS

Judgment No. 703

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Food and Agriculture Organization of the United Nations (FAO) by Mrs. Ciceil Gross on 5 March 1985, the FAO's reply of 14 June, the complainant's rejoinder of 18 August and the FAO's surrejoinder of 4 October 1985;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 1(b), 2(d) and 9(b) of the Inter-Organization Agreement concerning Transfer, secondment or Loan of Staff among the Organizations Applying the United Nations Common System of Salaries and Allowances (FAO Manual section 307, Appendix A), FAO Staff Rule 302.907 and FAO Manual provision 305.54;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant, a citizen of the United States, holds a permanent appointment with the United Nations. She was transferred on secondment by the UN to the FAO in Rome for two years from 1 April 1980 until 31 March 1982. She held a continuing post at the FAO as the Senior Officer of the Social Security Group in the Division of Personnel at grade P.5, and as such was in charge of social benefits for the whole staff. Her secondment was extended in turn to 31 December 1982, to 28 February 1983, to 31 March 1983 and to 31 August 1983.

On 18 August the Director of Personnel informed her, and on 19 August her supervisor confirmed, that her secondment would not be extended beyond 31 August. It was nevertheless extended until 15 September to enable her to arrange for her removal and return to New York. Several bodies representative of the staff protested on her behalf. On her return to UN headquarters she was assigned to a P.4 post and she is still employed there. On 15 November 1983 she appealed to the Director-General against his decision not to ask the UN to extend her secondment again. On 15 December the Assistant Director-General for Administration and Finance upheld the decision, and her case was referred to the FAO Appeals Committee. In its undated report the Committee was divided: the majority held that the FAO had based its decision on a correct reading of the provisions of the Inter-Organization Agreement on secondment, in particular Article 2(d) [\(1\)](#)

, and recommended dismissing the appeal; the minority believed that oral evidence was needed and that no recommendation could yet be made. By a letter dated 26 November 1984, which came to the complainant's notice on 7 December and which is the final decision she impugns, the Deputy Director-General informed her that the Director-General rejected her appeal: she had been separated on the expiry of the last extension of secondment agreed to by everyone concerned.

B. The complainant gives her own version of the facts. She observes that her work was highly thought of by both the Administration and the staff. Indeed in May 1983 the Deputy Director-General himself told her that she had good career prospects and should stay on. She then informed the Director-General that she agreed to secondment for a full five-year period. But in June the Director of Personnel said that further secondment was out of the question and she must be transferred outright. She agreed. But on 1 July the Director changed tack again: he could now offer only a three-year appointment. Yet she was entitled to a continuing one both under the Inter-Organization Agreement and because she had successfully completed one year's probation at the FAO. The Assistant Director-General for Administration and Finance told her on 9 July, and other senior officials later, that they were at a loss to understand the Director's attitude. Her supervisor refused an explanation. On 18 August the Director informed her that all offers were withdrawn and she must leave. The appeal was a miscarriage of justice and a denial of due process. She alleges breach of her rights as an FAO official, which are not diminished by her being on secondment. The fact of her secondment was immaterial once the conditions for granting her a continuing

appointment had been fulfilled, as they were. Moreover, there were no valid grounds for not renewing her fixed-term appointment. The first offer to extend her secondment for up to five years, and the second offer, to transfer her for a period she reasonably supposed to be continuing, were in bad faith, being rapidly withdrawn after she accepted. The last offer of a fixed-term appointment was unacceptable. Her reasonable expectations were frustrated. The termination of her appointment was arbitrary and unlawful. In any event she was not given due notice. She seeks reinstatement; compensation for material injury, including financial damage, which she assesses at 3,550,000 lire, due to her failure to give notice of termination of her lease in Rome, the cost of two weeks' stay without pay in Rome to settle her affairs, the loss of 550 United States dollars a month up to May 1986 because she could not recover occupancy of her flat in New York, and additional costs estimated at \$3,000. Failing reinstatement, she seeks additional compensation equivalent to the difference between her P.5 salary in Rome and her P.4 salary in New York, and compensation for the difference in pensionable remuneration and the compulsory age of retirement, which is 60 at the UN and 62 at the FAO.

C. In its reply the FAO challenges many of the complainant's allegations of fact, which it submits are distorted, or coloured, or misleadingly incomplete, or simply false. She affords no proof of the offers she says she received. Her arguments on the merits are based on two mistaken assumptions. The first is that her FAO appointment was terminated. In fact she held only a fixed-term one, and it simply came to an end under Staff Rule 302.907: "A fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment". As the Tribunal has repeatedly said, renewal is at the Director-General's discretion and there is no evidence to suggest that he exercised it improperly in this instance. The second misconception is that she had a right to transfer or to extension of secondment under the Inter-Organization Agreement. The fact that the agreement distinguishes between transfer and secondment shows that the latter is intended to facilitate movement to another organisation for only a limited period: outright transfer is not the purpose. That indeed is why Article 2(d) says secondment shall normally not exceed two years. The seconded official acquires no right of tenure in the "receiving" organisation, and the complainant was given only fixed-term appointments exactly coterminous with the extensions of her secondment. Completion of probation under a fixed-term appointment gives no right to a continuing one; nor does assignment to a continuing post. Lastly, the FAO submits that the claims for relief rest on unsupported and untenable assumptions.

D. In her rejoinder the complainant develops her submissions. She dwells at length on the facts of the case and rejects the FAO's presentation and interpretation of them. She believes she could reasonably expect a continuing appointment at the FAO not only because her performance had given satisfaction and her contract had been repeatedly renewed but also because of the repeated offers from the Administration. The embarrassing, even callous, mode of her termination, the FAO's failure to serve notice, its contemptuous refusal to explain its behaviour, which naturally aroused suspicion, and its unscrupulous attempts to mislead, distort and vituperate show that there was no justifiable cause for what it did. An arbitrary decision was taken from motives of prejudice and animosity. She has been replaced by a long-serving FAO staff member "less likely to delve too deeply into certain matters". She presses her claims in full and submits detailed estimates of the damage she alleges. She also claims \$25,000 as costs.

E. In its surrejoinder the FAO submits that the complainant has again distorted the facts and garnished her account with fantasy. She has misread the reply, her charges of prejudice are gratuitous, and her arguments are in many respects contradictory. She fails time and again to discharge the burden of proof. She could not have been granted a permanent appointment at the FAO during secondment from an organisation where she held one already. At one point the only possible solution, that of transfer, was offered to her, and she turned it down. The United Nations' refusal of extension of secondment was in itself enough to preclude any further FAO appointment. It is mistaken to say that she was unaware of the reason for the decision. Her relations with her supervisors had gone sour and she was unable or unwilling to take account of their views; as the very tone of her submissions betrays, her attitude was not compatible with her position and responsibilities. The FAO invites the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS:

The complainant's legal position

1. The complainant holds a permanent appointment with the United Nations at grade P.4. She was seconded by the United Nations to the FAO and employed there as the Senior Officer of the Social Security Group at P.5. The secondment was originally for two years but was extended by agreement between the two organisations to 31

December 1982, to 28 February 1983, to 31 March 1983, then to 31 August 1983 and lastly to 15 September 1983. The complainant then left the FAO and went back to the United Nations.

2. The purpose of secondment is exchange of staff between organisations, and it is governed by an Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations Applying the United Nations Common System of Salaries and Allowances.

According to Article 1(b) the Agreement "does not of itself give the staff member rights which are enforceable against an organization": it can be enforced only "to the extent that either the organizations have included appropriate provisions in their administrative rules or the parties have accepted to apply it in the individual case".

Article 2(d) provides that secondment is "for a fixed period, normally not exceeding two years", but may be extended by agreement between the organisations concerned. While retaining his rights in the "releasing" organisation, the staff member shall be subject to the staff regulations and rules of the "receiving" organisation.

Under Article 9(b) the staff member's contractual status is that of an official with a fixed-term appointment.

3. The complainant's contention that the Agreement does not apply is mistaken. According to FAO Manual provision 305.54 transfers, secondments and loans from the United Nations and its specialised agencies are governed by Manual section 307. The Inter-Organization Agreement is Appendix A to section 307. It is therefore to be treated as part of the FAO's "administrative rules" within the meaning of Article 1(b) cited above and is enforceable between the parties under 1(b).

By virtue of Article 9(b) the complainant was therefore a "staff member with a fixed-term appointment" while on secondment to the FAO. Indeed that is confirmed by the terms of her appointment to the staff. In announcing the vacancy which the complainant was assigned to, the FAO did describe it as a "continuing" post coded "C", but the text of her appointment is explicit that she was on a two-year secondment from the United Nations, and that means she was in fact appointed for a fixed term. Besides, so long as she held a continuing appointment at the United Nations she could not obtain one elsewhere.

4. The Tribunal has consistently held that an official on a fixed-term appointment does enjoy judicial protection. Although at the expiry of the fixed term the organisation may let his appointment end at its discretion, the decision is one the Tribunal will review.

Though a seconded official holds a fixed-term appointment his position is out of the ordinary. He cannot expect his contract to last more than two years unless the organisations decide differently. But on leaving the receiving organisation he goes back to the releasing one, to whose staff he belongs and he has no need to seek other employment. It is therefore only reasonable that either organisation should have the right to end the secondment if it so wishes on the expiry of the prescribed period without having to explain its decision.

This view takes account of the rightful interests of both organisations: the releasing organisation should not be forced to keep the seconded official's former post in store for him indefinitely; and the receiving organisation should remain free as the need arises to appoint someone else to a post it has created.

The complainant's pleas

5. The complainant maintains that her work at the FAO was very good, and indeed both her supervisors and her subordinates did often acknowledge it was so. But that is not sufficient reason for extending her secondment beyond the period agreed on by the two organisations. On the contrary, she must have realised that her position in the FAO was uncertain and that unless both organisations agreed to an extension her secondment would end when the time ran out.

It is therefore immaterial whether the complainant, who was on rather bad terms with some of her supervisors, gave cause for grievance which led to the FAO's decision. Even if the complainant was in no way to blame for the difficulties that arose, the quality of her work affords no sound reason for extending her appointment.

6. She pleads that she was dismissed and that some valid reason is due for such a decision. The plea is mistaken. Staff Rule 302.907 is explicit: separation as a result of the expiry of a fixed-term appointment shall not be regarded as termination within the meaning of the rules.

7. The complainant relies on promises she says were made to her by the Director of Personnel. In particular she alleges that he offered in turn to extend her secondment to a total of five years, to have her transferred from the United Nations to the FAO, and to grant her a three-year appointment. The alleged promises were not in writing, the FAO denies they were ever made and it is not proved that they were. Besides, to be enforceable they would have had to be agreed to by both organisations, and the complainant herself does not contend that the United Nations endorsed them. They afford no grounds for allowing her complaint.

8. The complainant submits that the impugned decision is flawed because no reasons were given for it. But, as is clear from 4 above, the FAO was free to end the secondment without giving any reason other than its expiry, something the complainant was quite aware of anyway. The FAO was under no duty to explain its decision.

The Tribunal held in Judgment 675 that an organisation which decides not to renew a fixed-term appointment must have a good reason for its decision and must give it to the official. But the rule applies to staff members who hold fixed-term appointments with their own organisation, and who may expect renewal; it does not apply to those like the complainant who are on secondment and may not ordinarily expect extension of the secondment.

9. Lastly, the complainant objects that she was not informed of her separation soon enough to be able to make arrangements to leave Rome and go back to New York. Though Rule 302.907 provides for automatic expiry of a fixed-term appointment without notice, it is not to be read strictu sensu. Even on secondment the holder of a fixed-term appointment is entitled to know the date of separation early enough to enable him to arrange things.

The evidence does not suggest that the FAO discharged its duty in that respect. The complainant herself acknowledges that just after 15 July 1983 her supervisor informed her that her appointment would expire and on 19 August warned her that her secondment was coming to an end; and the FAO states that in mid-July the Assistant Director-General for Administration and Finance told her, and the Director of Personnel confirmed by telephone, that her appointment would not be renewed. But for lack of written proof there is still some doubt about the date on which the complainant was actually given notice of separation. In the circumstances the Tribunal holds that the impugned decision is flawed because it was not communicated to her in time. It is, moreover, immaterial that the secondment was extended at the eleventh hour from 1 to 15 September 1983, a period too short to enable her to make proper arrangements for her removal.

The Tribunal's decision

10. The Tribunal concludes that the complaint is devoid of merit except on the question of notice, but that because of this flaw the FAO should pay the complainant 2,000 United States dollars as damages and another \$2,000 as costs.

DECISION:

For the above reasons,

1. The FAO shall pay the complainant US\$2,000 as damages and \$2,000 as costs.
2. Her other claims are dismissed.

In witness of this Judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Sir William Douglas, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 14 November 1985.

(Signed)

André Grisel

Jacques Ducoux

William Douglas

A.B. Gardner

1. "Secondment' is the movement of a staff member from one organization to another for a fixed period, normally not exceeding two years, during which he will normally be paid by and, except as otherwise provided hereafter, be subject to the staff regulations and rules of the receiving organization, but will retain his rights of employment in the releasing organization. The period of secondment may be extended for a further fixed period by agreement among all the parties concerned."

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