

FIFTY-EIGHTH ORDINARY SESSION

In re SNELL

Judgment No. 744

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Food and Agriculture Organization of the United Nations (FAO) by Mr. John Snell on 23 July 1985, the FAO's reply of 14 October, the complainant's rejoinder of 26 November and the FAO's surrejoinder of 30 December 1985;

Considering Article II, paragraph 5, of the Statute of the Tribunal, section 27(j)(ii) of the headquarters Agreement between the Organization and the Government of Italy, FAO Staff Regulations 301.081 and .083, FAO Staff Rules 302.81, .82 and .83, FAO Manual section 348.22 and .112, and Annex D to Manual section 103;

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 United States citizen, joined the FAO in Rome in 1981 and from January 1984 was general secretary of the Association of Professional Staff (APS), a staff body recognised under Staff Rule 302.81. As provided for in section 27(j)(ii) of the headquarters Agreement between the FAO and the Italian Government, there is a shop known as the Commissary at which FAO staff and their dependants may buy goods "free of duty" and "in reasonable quantities", and there is a Commissary Committee on which Administration and staff are represented: according to FAO Manual section 348.22 the FAO runs the Commissary "in consultation with the Joint Standing Committee on the Commissary". The FAO felt that staff were spending too much time at the Commissary during office hours, and Circular 84/7 of 13 February 1984 announced that it had been decided, "after consultation with the Joint Commissary Committee", to introduce new hours of opening. The complainant found them inconvenient and on 15 March appealed to the Director-General. Having received no reply, he lodged an appeal with the FAO Appeals Committee on 13 July. The members of the Committee were divided. In a majority held that they were not competent to hear the appeal because it fell within the sphere of staff relations. In the Committee's report of 19 March 1985 they recommended rejecting the appeal, and by a letter of 24 April, the impugned decision, the Deputy Director-General informed the complainant that the Director-General did so.

B. The complainant submits that his case turns on non-observance of the FAO Staff Regulations and Staff Rules, as well as of the terms of reference of the Commissary Committee which were issued under those rules. The Commissary is a staff benefit by virtue of Annex D to Manual section 103, on "Commissary privileges", and Manual section 348, on "Staff facilities". In particular 348.112 says that facilities may be altered only after consultation with the staff representatives. Such consultation is in any event a right embodied in the Staff Regulations. The complainant asserts a personal interest in access to the Commissary, which the FAO has severely restricted by reducing the number of hours during which it is open and by making it unbearably crowded during those hours. He can no longer buy goods in "reasonable quantities".

As to the merits, he submits that the decision is invalid. (1) The Commissary Committee alone is competent to reduce opening hours by virtue of paragraph 3 of its terms of reference: "Re Director-General hereby delegates authority to the Committee to decide on day-to-day operations and service arrangements, including such matters as ... hours of operation". The delegation being the subject of agreement with the staff, it would be in bad faith for the Director-General to seek to withdraw it. (2) The Director-General acted in breach of Rule 302.83: "... 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 recognised staff representative body...". Although a few members were hastily summoned to be told of the decision, the Committee as such never discussed the matter. (3) There was also an error of fact in that the circular said the decision had been taken after consultation.

The complainant invites the Tribunal to quash the decision of 24 April 1985, order the FAO to allow him access to the Commissary at the former hours of opening and award him 1,000 United States dollars as damages and any other relief it deems fit.

C. In its reply the FAO submits that the complaint is irreceivable. (1) The allegation of breach of the terms of the complainant's appointment and of the FAO rules is just a stratagem to bring the dispute within the Tribunal's competence. In fact there was neither breach of the staff's right to organise, nor denial of recognition of any staff body, nor refusal to consult a recognised staff body. There was, in particular, no breach of Rule 302.83 unless it be construed as requiring the Director-General to comply with anything a staff body may say. Nor does Annex D to Manual section 103 confer any right on staff to have access to the Commissary at any particular time of the day. The Joint Commissary Committee's terms of reference are not part of the staff rules or of the terms of the complainant's appointment. (2) The complainant has no locus standi. The purpose of his complaint is not to assert his rights as a staff member but to plead a defect in relations between staff and Administration. Even if there were such a defect his right to buy goods at the Commissary has not been infringed, His claims are not substantiated.

The FAO further submits that in any event the complaint is devoid of merit. De Joint Committee's terms of reference do not divest the Director-General of his authority under the FAO Constitution to change the opening hours of the Commissary. In particular, Regulation 301.0811 reads: "Negotiations between recognised staff representative bodies and the Director-General shall be subject to the understanding that the Director-General will retain ... the right of final determination in matters within his authority". Paragraph 1 of the terms of reference of the Committee says that it is responsible "for guidance on policy and overall management of the Commissary". And Manual section 348.22 makes it plain that the Committee is only an advisory body. The complainant is therefore misconstruing paragraph 3 of its terms of reference. Besides, the purpose of the change in opening hours was to improve staff efficiency by preventing absences of staff during office hours, and that is a matter on which the Director-General has not delegated authority to the Committee. Lastly, the complainant is mistaken in alleging that the Committee was not consulted: it met on 8 February 1984, several days before the circular was issued. The fact that the staff representatives were opposed to the change for reasons the Director-General found unconvincing does not make his decision invalid.

D. In his rejoinder the complainant enlarges on his original arguments and seeks to refute the FAO's submissions on receivability and on the merits. His main contentions are that his rights as a staff member were infringed and their infringement caused him prejudice because he is now less able to buy goods at the Commissary; that the Director-General was in breach of an obligation to negotiate with the staff, embodied in Regulation 301.081 and Rules 302.81 and .82; that the Director-General's authority comes into play only when negotiations with the staff break down altogether; that the proper procedure for negotiating with the staff representatives on the Commissary Committee was disregarded; and that it is specious to maintain that their views were given due account.

E. In its surrejoinder the FAO develops its arguments on the Tribunal's competence and on receivability It produces evidence purporting to show that sales to the staff at the Commissary have little altered since the change in opening hours and that the complainant has suffered no prejudice.

As to the merits, it observes that the Committee was set up, not by agreement with the staff, but by a decision of the Director-General. Its terms of reference must be read in the light of Regulation 301.083 and other rules which confer final authority on the Director-General. Proper consultation did take place. In any event a modification of the procedure would have been warranted to ensure stricter observance of working hours.

CONSIDERATIONS:

THE FACTS

1. Under the headquarters Agreement between the Organization and the Government of Italy officers of the Organization enjoy the right to import certain commodities free of duty through the medium of the Organization. The facility created to enable staff members to enjoy this right is known as "the Commissary". In March 1979 a Joint Commissary Committee was designated by the Director-General to be responsible for guidance on policy and overall management of the Commissary. Its terms of reference were negotiated and agreed between the management and the staff.

2. In or about February 1984 the Director-General came to the conclusion that the possibility of staff shopping during office hours was being abused. On 8 February at 2 p.m. the Assistant Director-General in charge of Administration and Finance (ADG/AF) addressed a gathering of certain staff representatives at which he proposed a change in the opening hours of the Commissary designed to diminish the use of normal working hours. The representatives replied that the proposal should be addressed to the Joint Committee. Later in the same afternoon a

meeting of the Joint Committee was summoned in some way which is not described in the dossier. There was no written notice of it and no agenda. There was some discussion. On 9 February the ADG/AF addressed to the Chairman of the Joint Committee a memorandum headed "Change in hours of the Commissary". He stated that as a result of the meeting held with the Commissary Committee on 8 February the comments from the members were taken into account and the Director-General had decided to change the hours as was specified. He hoped that the Committee would support the decision, whose implementation was to begin on 14 February. The 11th and 12th were Saturday and Sunday respectively and on 13 February the ADG/AF issued circular 84/7 in the terms of his memorandum of 9 February.

3. On 15 March 1984 the complainant, who is the General Secretary of the Association of Professional Staff, appealed against the decision in circular 84/7. On 19 March 1985 the Appeals Committee by a majority recommended the rejection of the appeal on the ground that the complaint did not concern an individual grievance but fell within the "collective sphere" of staff relations. Following this recommendation, on 24 April 1985 the Director-General decided to reject the appeal and this is the decision impugned.

COMPETENCE

4. Article II, paragraph 5, of the Tribunal's Statute stipulates that the Tribunal shall be competent to hear complaints alleging non-observance of the terms of appointment of officials. In his pleadings the complainant alleges inter alia breach of the Joint Committee's terms of reference. The question is therefore whether these terms are part of the complainant's terms of appointment. The Tribunal concludes that they are. The right to import goods duty free through the medium of the Organization is a right granted to individual staff members. The exercise of the right must necessarily be regulated by an agreement between the individual members and the medium and so such an agreement is a natural part of the contracts of employment. Moreover, the right granted under the agreement is a benefit which accrues to the official by virtue of his employment and as such it is suitably recognised in Manual sections 103, Annex D, and 348.

5. The Organization alleges that the complainant has no locus standi. The Tribunal disagrees. It is immaterial whether or not the breach of the terms of reference, if proved, causes him any special damage. The object of the terms is to regulate the joint control of the Commissary; any breach of it by the Organization which usurps control is the concern of any one or all of the staff members.

THE VALIDITY OF THE CIRCULAR

6. The Joint Committee created by the terms of reference consists of eight members, four representing the Director-General and four the staff, and an independent Chairman -- appointed by the Director-General -- who is not a member and has no vote. Control is divided in accordance with Article 2 (which gives control to the Director-General, the Committee having consultative status only, on policy matters, financial matters and administration) and Article 3, which covers day-to-day operations and service arrangements, including specifically "hours of operation". Under Article 3 the Director-General delegates authority to the Committee to take decisions, which are to be "transmitted for implementation to the Director, AFS".

7. The work of the Joint Committee is governed by rules of procedure. The Committee is to meet at least once a month, and note of the date and agenda of such meetings is to be communicated to all members, preferably five days before the meeting. At the written request of any three members, the Chairman may convene an emergency meeting. A proposal to cure an abuse, not by disciplining the offenders but by imposing restrictions on the whole staff, is obviously one that requires careful consideration. It is not one that creates any emergency. It is unnecessary for the decision in this case to determine whether such a proposal raises questions under Article 2 or Article 3 or under both. Whatever it be, the proposal must be considered by a meeting of the Joint Committee summoned in accordance with the rules of procedure. This is an essential condition to the validity of any executive action. It was not complied with by the procedures summarised in paragraph 3.

REMEDIES

8. The complainant asks for 1,000 dollars as compensation for the inconvenience which he has personally suffered as a result of the changed hours. The Organization has submitted a list of his purchases to support an allegation that they have not been diminished as a result of the change in hours. The complainant will no doubt achieve his principal object by the quashing of the decision impugned and it is inappropriate to quantify at this stage exactly

what damage he has suffered. The Tribunal will award a nominal sum of US\$100.

DECISION:

For the above reasons, the appeal is allowed and it is ordered that:

1. the decision of 24 April 1985 be quashed;
2. the Director-General direct that the hours of the Commissary be restored to those in force before 13 February 1984; and
3. the complainant be awarded US\$100 as compensation and US\$1,000 as costs.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable the Lord Devlin, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 17 March 1986.

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner