

SEVENTY-FIRST SESSION

In re TRESALTI MENGHI (No. 2)

Judgment 1112

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Diana Tresalti Menghi against the Food and Agriculture Organization of the United Nations (FAO) on 9 November 1990 and corrected on 24 November 1990, the FAO's reply of 22 January 1991, the complainant's rejoinder of 28 February, the complainant's application of 28 February to the President of the Tribunal and the Organization's surrejoinder of 30 April 1991;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, Articles 9, paragraph 2, and 19 of the Rules of Court, FAO Staff Rules 302.6214, 302.6217 and 303.131 and FAO Manual paragraphs 308.55 and 323.53;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. The complainant, an Italian citizen, joined the FAO in 1970. Her career in the Organization, where she holds grade G.6, is summed up under A in Judgment 1009.

Having been granted several periods of sick leave over the past four years, the complainant ceased on 13 October 1988 to be entitled to sick leave on full pay under FAO Rule 302.6214. On 17 October she applied for another 90 days' sick leave on the strength of a doctor's certificate.

The Organization wanted her to undergo a medical examination in keeping with Rule 302.6217 and for that purpose asked her in telegrams sent to her in Rome in November 1988 to get in touch with its medical service. She answered by telegrams of 14 and 21 November that she was not well enough to go to headquarters. On 23 November the FAO's medical officer told her by telegram that her reasons for not reporting to his service were unacceptable and he refused to approve her application for further sick leave. The Director of the Personnel Division warned her by a telegram of 23 November of the consequences of refusing to undergo examination and ordered her to do so. On 28 November she was examined in the medical service and her application for sick leave was approved.

Although she got a routine payslip for November 1988 her salary for that month was not credited to her accounts at the Banca Commerciale Italiana in the usual way but was put - without her knowledge - "at her disposal" with the bank. After the expiry on 13 October 1988 of her entitlement to sick leave on full pay she changed to half-pay status but the Organization kept her on full pay by charging half of each day's absence to her accrued annual leave in accordance with Manual paragraph 323.53. By a telex of 29 December 1988 she asked that her accrued annual leave be left alone and alleged financial hardship due to the FAO's failure to pay her. On 10 January 1989 she made over jewelry as security for a bank loan.

By a letter of 17 January 1989 the FAO informed her that she was put on half pay as from 14 October 1988 in keeping with her wish not to draw on her annual leave and that she must reimburse overpayments she had received of "approximately" 3,970,000 lire. On 1 February 1989 the bank informed her that the sums the FAO had put at her disposal on 29 November, 7 and 28 December 1988 and 27 January 1989 would be credited to her bank accounts. On 27 February 1989 she appealed to the Director-General against the Organization's demand for reimbursement and against the delay in payment of her salary for February. The Director-General rejected her appeal on 23 March and she filed with the Appeals Committee on 26 April.

In its report dated 11 October 1989, and submitted to the Director-General on 2 February 1990, the Committee recommended that the parties seek agreement on compensation for any financial injury she might have sustained between the beginning of December 1988 and the end of January 1989. But by a letter of 8 August 1990, the decision she impugns, the Director-General rejected the Committee's recommendation.

B. The complainant observes that, without explanation or notice, on 25 November 1988 the FAO stopped paying her salary. Nothing on the payslip she got for November reflected any change in her "payroll payment instructions". Though she got no pay for December 1988 or January 1989 either, at least the payslips for those two months bore the words "not paid". She could get neither a satisfactory explanation from the Personnel Division nor an advance to ease the financial hardship. She had to pledge the jewelry to get one bank loan and have a third party guarantee another. The loans cost her over 8,000,000 lire in interest payments and bank charges.

She wants compensation for the financial injury caused by the FAO's suspension of her pay and a detailed statement of the overpayments in October 1988 and of her entitlements for January and February 1989.

C. In its reply the FAO submits that the complaint is irreceivable because the complainant has failed to exhaust the internal means of redress. What her internal appeal challenged was the FAO's order that she reimburse overpayments and the delay in paying her salary for February 1989. Although in her rejoinder on that appeal she did claim damages for non-payment of part of her November 1988 salary the claim did not properly form part of her appeal. Nor did she lay claim in her internal appeal to information about overpayments in October 1988 or her entitlements for January and February 1989.

On the merits the FAO points out that the disruption in payment was no fault of its own. By putting off her medical examination until 28 November 1988 she raised doubts as to her entitlement to sick leave and so it decided to withhold her salary. Once it had granted her sick leave it had to recalculate her entitlements at half-pay rates. Its practice is to make such special payments by "salary advance voucher" and it followed her instructions by remitting the sums to her bank. It is not liable for the fact that the bank kept the sums at her disposal instead of crediting them to her accounts.

As for her claims to a breakdown of her entitlements for January and February 1989 and information on the overpayments in October 1988, it has made such information available to her in correspondence and recapitulates it.

D. In her rejoinder the complainant enlarges on her contention that her salary was unlawfully withheld. If, as the FAO maintains, the half-days she owed it for October and November had been charged to her annual leave, why did it need to stop payment? She increases to 10,829,890 lire the amount of the financial injury she alleges that the interruption in salary payments caused her, and she presses her claims.

By a letter of 28 February 1991 the complainant applies to the President of the Tribunal for an order under Article 19 of the Rules of Court that one text appended to the FAO's reply be produced in its entirety and that another be checked by a chartered accountant. She further applies to the President for orders under Article 9(2) of the Rules that the FAO disclose her payroll status form for February 1989 in compliance with FAO Manual paragraph 308.55.

E. In its surrejoinder the Organization, observing that the complainant's rejoinder adds nothing new to her case, maintains the pleas in its reply. It submits that the orders she applies for would shed no new light on the issues in dispute.

CONSIDERATIONS:

1. The complainant submitted an internal appeal to the Director-General under Staff Rule 303.131 by a letter dated 27 February 1989. The relief she sought was immediate payment of her February 1989 salary, withdrawal of a demand by the FAO for repayment of 3,970,000 lire and the holding of a formal inquiry to discover why so much had been done to make life difficult for her. She observed that she had already objected to the unwarranted failure to pay her salary for November and December 1988 but acknowledged that the FAO had paid the sums later.

In a letter of 23 March 1989 the Assistant Director-

General in charge of Administration and Finance informed her of the rejection of her appeal: he pointed out that her salary for February had been paid and that the reasons for the demand for repayment had been explained to her several times in clear and correct terms.

In an appeal she submitted to the Appeals Committee on 26 April 1989 she asked no more than that the

Organization's demand for repayment of 3,970,000 lire should be reversed as unfounded and at variance with the statement of account.

The Committee reported on 11 October 1989. It found that the complainant had failed to establish her claim about the overpayment. It went on to consider her claim to compensation for financial difficulties, a new element which she had introduced in her rejoinder and which the Organization had objected to in its surrejoinder. The Committee observed that payment of her salary had been stopped for November 1988 because the extension of her sick leave had not yet been formally approved. She had been asked to report for medical examination on 28 November but the decision to withhold payment had been made on the 25th. The Committee held that the decision had been premature, even though she had not in fact turned up on the 28th, and that the decision might have caused her financial injury up to 1 February 1989, but that for want of evidence from her it was impossible to measure the loss. Its recommendation was that in consultation with her the Organization should try to reach agreement on the matter of compensation for any financial loss she had incurred in the period from the start of December 1988 to the end of January 1989.

Having received the Committee's report, however, the Director-General rejected her appeal on 8 August 1990 on the grounds that there was no call for any grant of compensation. That is the decision she impugns, and she claims: (1)an award of damages for the financial loss she has incurred because of the unlawful withholding of her salary;

(2) an order that the Organization set out the exact overpayments for October 1988 and for January and February 1989 and state whether or not deductions were made in favour of the FAO Credit Union.

2. Insofar as the complainant is claiming damages for financial loss due to the withholding of salary her complaint is not receivable. If there is any substance to it at all, her claim derives from late payment of her salary for November and December 1988: those are administrative decisions which she has never challenged and she has therefore failed to exhaust the internal means of redress, as Article VII(1) of the Tribunal's Statute requires.

3. Insofar as she makes a claim in relation to the calculation of the amount of the overpayment, the comprehensive statement she was given for the period from November 1988 to May 1989 sets out clearly her entitlements, the payments made, the amount of the refunds deducted and the balance due. So under this head she shows no cause of action.

4. That being so, her application of 28 February 1991 to the President of the Tribunal for the disclosure of texts and for the auditing of another serves no material purpose.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 3 July 1991.

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner