

SEVENTY-SECOND SESSION

In re CARRETTI (No. 2)

Judgment 1163

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Miss Giuliana Carretti against the Food and Agriculture Organization of the United Nations (FAO) on 10 August 1990 and corrected on 7 January 1991, the FAO's reply of 17 April, the complainant's rejoinder of 10 July and the Organization's surrejoinder of 30 August 1991;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Regulation 301.111, FAO Staff Rule 302.4102 and FAO Manual paragraphs 303.26, 308.411 and 315.323;

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. As is stated, under A, in Judgment 1162 delivered this day on her first complaint, the complainant joined the Organization in 1976 as a bilingual shorthand-typist at grade G.4. The FAO confirmed her appointment in 1977 and promoted her in 1978 to G.5. In 1980 she was transferred to the Plant Production and Protection Division (AGP). In December 1983 or January 1984 she was transferred to the Temporary Secretarial Assistance Programme (TSA). Over the next seven years she had 29 assignments under TSA.

FAO Manual paragraph 308.411 defines the within-grade salary increment as "an increase in pay from one step to the next higher step ... on the basis of satisfactory service during a qualifying period". It says:

"The qualifying period is one year, except that ... steps XII, XIII and XIV of grades G-1 through G-6 at Headquarters are preceded by two years at the previous step before an increment is granted."

On 1 June 1987 the complainant reached step XI in G.5 and began the two-year period qualifying her for the next increment. After a long absence on sick leave she applied to the Assistant Director-General in charge of Administration and Finance for an established post under Staff Rule 302.4102(iii).

Between 1 September 1987 and 31 May 1989 she got eleven assignments and eleven performance appraisal reports. None rated her general performance "unsatisfactory"; one described her work as "satisfactory", one as "good" (the former equivalent of "above average"), seven as "above average" and two as "outstanding".

By a memorandum of 25 April 1989 the Chief of the Recruitment Planning and Staff Development Service (AFPR) told her that because "reservations have been made about your general conduct" he could not recommend granting her the salary increment due at 1 June 1989. On 30 May she appealed to the Director-General against the memorandum challenging the Chief of AFPR's authority to make such a recommendation and objecting to his appraisal of the facts. The Director of the Personnel Division answered in a memorandum of 30 May that he accepted the reasons given in the memorandum of 25 April. By a letter of 19 June 1989 the Assistant Director-General rejected her case on the Director-General's behalf, even though he did not regard it an "appeal" under Regulation 301.111, adding that the Chief of AFPR had authority to make the recommendation which had led to the withholding of her increment.

On 14 July 1989 she went to the Appeals Committee. In its report of 5 March 1990 the Committee recommended rejecting her appeal and by letter of 16 May 1990, the decision under challenge, the Director-General confirmed the withholding of her increment.

B. The complainant submits that the Director-General's decision shows several flaws. She puts forward five pleas.

She contends, first, that the Chief of AFPR had no authority to recommend withholding her increment. Manual paragraph 315.323 empowers a staff member's division director to make such a recommendation. Unlike the Chief

of AFPR, to whom she never reported directly, any of the four division directors who supervised her during the qualifying period had the authority.

Her second plea is that the construction the FAO put on Manual paragraph 308.411 amounted to a mistake of law. Though the Tribunal held in Judgment 294 (in re Connolly-Battisti No. 4) that an official "whose increment was withheld otherwise than on the grounds of unsatisfactory service would [have] cause for complaint", the FAO denied her increment not because of her work - which it said was of "high quality and quantity" - but because of her conduct. Unsatisfactory conduct makes an official liable to disciplinary action; unsatisfactory service, which may warrant withholding an increment, does not. According to the case law only when unsatisfactory conduct impairs the quality of service and is not contested may unsatisfactory conduct be brought under unsatisfactory service. In the instant case neither condition is fulfilled.

The complainant's third plea is that the Director-General failed to take account of essential facts and drew plainly mistaken conclusions from the evidence. None of the eleven performance appraisal reports she received during the qualifying period rated her performance "unsatisfactory": there was but one "satisfactory" rating, the others being "good", "above average" or "outstanding". Her reporting officers expressed willingness to make use of her services again insofar as the state of her health, which prevented her using the word processor, would allow. Whatever their reservations and however well-founded, it was wrong to endorse a recommendation which was at odds with the appraisals of her supervisors and which was made by someone she had met on only one occasion, in 1988, in her seven years with TSA.

Her fourth plea is breach of the Organization's duty to base its decision on a reasonable and fair reporting system. As it applies to TSA staff the present system is flawed in three ways:

- (a) reports may be based on unreliably short periods of service;
- (b) reporting officers often sign appraisals of officials whose work they have not supervised;
- (c) contrary to Manual paragraph 303.26 TSA officials cannot see their reports and comment on them.

In her final plea the complainant submits that the Director-General's decision is tainted with prejudice. Her request for a permanent post having been pending for several years, she asked the Assistant Director-General in charge of Administration and Finance on 1 September 1987 to act under Staff Rule 302.4102(iii). Only then did she begin to face charges of poor relations with other staff. The officials who concocted such accusations were the very ones who were to blame for keeping her on temporary posts. Further proof of bias in the Personnel Division is the fact that it gave instructions to withhold her increment on 17 May 1989 two weeks before the Director of Personnel took the final decision of 30 May 1989.

She asks the Tribunal to quash the Director-General's decision of 16 May 1990 and award her step XII in grade G.5 as from 1 June 1989, the amounts due her to bear interest at 12 per cent a year. She claims moral damages in an amount to be set by the Tribunal and an award of costs.

C. In its reply the FAO submits that the impugned decision was both warranted and lawful.

The recommendation was neither ultra vires nor improper. The rule in Manual paragraph 315.323 that a division director who so wishes may recommend withholding of increment to the Director of Personnel is of general application. Since the complainant was in the Division of Personnel it would have served no purpose for the division director to address a recommendation "to himself". In keeping with the spirit of the rule such a recommendation could be made only by the chief of her service on the strength of appraisals from the division directors who supervised her work.

As for the alleged mistake of law, the FAO contends that her service was unsatisfactory in the qualifying period and her misconduct proven. She was granted her right to a hearing after getting the two written warnings that form the subject of her first complaint. Her failure to maintain "harmonious working relationships" mentioned in her staff reports and the two warnings show that the conditions in the case law for linking unsatisfactory conduct to unsatisfactory service are met.

The FAO rejects her allegation that it overlooked essential facts. It has never questioned her technical skills: the material issue is her ability to maintain proper working relations with fellow staff and supervisors.

The system of appraisal does not discriminate against temporary secretarial staff. Their situation being unlike that of staff on permanent posts, it is only reasonable to appraise their performance at the end of each assignment. There is no truth to her statement that she could not see and comment on her reports: the evidence shows she had unrestricted access to them and full freedom to state her views.

The Organization firmly rejects her allegations of prejudice. Her difficulty in getting on with other staff did not begin when she wrote to the Assistant Director-General; they were plain long before the qualifying period. The officials she names did not "concoct" accusations of improper behaviour: many officials have expressed reservations about her conduct. It was computerisation of the FAO's financial services not bias that led the Division of Personnel to block payment of her increment before the Director's decision had time to go through.

D. In her rejoinder the complainant develops her arguments and presses her claims. She alleges that the chief of her unit was indifferent to the work she and other temporary staff were doing. "Satisfactory service" and "harmonious working relationships" are two separate notions. Her service was satisfactory; besides, the reports alleging poor relationships are flawed. The conditions the case law sets for bringing unsatisfactory conduct under unsatisfactory service are not met: she has never been the subject of disciplinary action. Not only did the FAO fail to take account of essential facts, but it has distorted them in its reply. The Chief of AFPR disregarded her staff reports and her former supervisors' declared willingness to take her back. The Organization has levelled quite groundless accusations against her.

E. In its surrejoinder the FAO objects to the complainant's attempts in her rejoinder to cast doubt on its good faith and honesty. The proof of her difficulty in getting on with other staff is in the documents she herself has filed. There is nothing in her rejoinder to cause the FAO to change its position.

CONSIDERATIONS:

1. Manual paragraph 308.411 defines the within-grade salary increment as "an increase in pay from one step to the next higher step within an established grade, on the basis of satisfactory service during a qualifying period".

The complainant seeks the quashing of a decision, which the Director-General of the FAO took on 16 May 1990 on the FAO Appeals Committee's recommendation of 5 March 1990, to reject her internal appeal and confirm the withholding of her within-grade salary increment due at 1 June 1989. The grounds that the Director-General gave were that she was not entitled to the increment because she had failed to give satisfactory service during the qualifying period.

2. The impugned decision of 16 May 1990 does not explain why she had failed to do so, but the reasons were given to her in a memorandum dated 25 April 1989 from the Chief of the Recruitment Planning and Staff Development Service (AFPR). The memorandum first mentioned the several assignments she had had during the qualifying period in different divisions of the Organization. It then said:

"The performance appraisal reports received from the various divisions indicates that your technical skills, i.e. your typing and shorthand abilities and your knowledge of English, French and Spanish, are fully satisfactory. You are reported to produce work of high quality and quantity and to show initiative.

However, reservations have been made about your general conduct. AGA reported that you had occasional periods of negative attitude towards authority, that you might without apparent personal consideration tactlessly interrupt or interfere with work or conversation and that you were unnecessarily insistent or opinionated in your attitude towards work matters. Both DDC and ESH reported that you had difficulties in dealing with people. [AGA, DDC and ESH were three of the divisions she had worked for.]

You will recall your unwillingness to undertake an assignment in FODO [another division] in August 1987, when you stated that you were unable to work for [an official of FODO] were unwilling to do clerical work and made disparaging remarks about [an administrative officer]. Again in February 1988 you were uncooperative regarding a FODO assignment to such an extent that the Division requested that you be replaced on the first day of your assignment. Regrettably, this lack of cooperation was again demonstrated recently when you were requested to move within DDF [another division]; you responded in a rude manner, went home and called in sick.

Additionally, the period under review has also been characterised by several unpleasant confrontations between

yourself and various officers of AFP [the Personnel Division], who have found your behaviour unacceptable. Your lack of cooperation, refusal of assignments, complaints about being required to show flexibility where clerical tasks are concerned and your offensive remarks about other staff members have led to an inordinate amount of time and energy being spent in an attempt to place you on either a post or a temporary assignment."

The Chief of AFPR concluded by referring to the warnings given to her on 29 February and in "succeeding memoranda" and reminded her that he had then advised her that should her "ability to maintain harmonious working relationships" not soon improve he would have to recommend her termination for unsatisfactory service.

3. The Chief of AFPR based his recommendation for withholding the complainant's increment on Manual paragraph 315.323, which reads:

"If the Division director wishes to recommend that [a within-grade salary increment] of a listed staff member should be withheld, he/she notifies the staff member in writing accordingly before the first of the month prior to that in which the increment is due, explaining the reason. A copy of this memorandum with a covering note is sent to the Director, AFP who decides whether the withholding of the increment is justified and notifies the staff member accordingly by memorandum, copied to the division director."

4. The complainant has five main pleas:

- (1) that the official who recommended withholding her increment had no authority to do so;
- (2) that the FAO committed a mistake of law in construing Manual paragraph 308.411;
- (3) that it overlooked essential facts and drew clearly wrong conclusions from the evidence;
- (4) that it was in breach of its duty to base its decision on a fair system of performance appraisal; and
- (5) that the decision was tainted with personal prejudice against her.

5. Of those five pleas the Tribunal upholds the second.

The material issue is whether the conditions whereby unsatisfactory conduct may impair the quality of service of an official are met.

In Judgment 247 (in re Nemeth) the Tribunal held:

"12. The [FAO's] Staff Regulations distinguish between unsatisfactory conduct and unsatisfactory service. The latter is covered by Manual section 315.322 and can lead only to the withholding of increment, and this ... is not a disciplinary measure. Unsatisfactory conduct on the other hand is naturally a subject for disciplinary action which is covered by Manual sections 301 and 330."

That judgment went on to explain that unsatisfactory conduct may or may not affect the quality of the service given, and that to bring it within the concept of unsatisfactory service, two conditions, one positive and the other negative, must be fulfilled. The positive condition is that it must be established that the unsatisfactory conduct did "affect the quality of the officer's service". The negative condition is that the conduct "must not in the particular case give rise to a dispute". The conditions are cumulative: both must be fulfilled before it can be said that the unsatisfactory conduct affects the quality of service.

Judgment 512 (in re Diaz de Borsody No. 2) adopted the same reasoning. Although the two judgments were about cases of insubordination the same reasoning applies to the circumstances of this case as referred to in the memorandum of 25 April 1989.

6. The eleven reports which the complainant has filed appraising her performance as a temporary secretarial assistant in the qualifying period from 1 June 1987 to 31 May 1989 relate to ten assignments and cover 21 months of that period.

The report concerning her work in the DDCI Division from 8 to 23 February 1988 describes her as having "difficulties in dealing with people". Another report, from the ESHW Division, covering the period from 1 April to

1 July 1988, says that she "maintains good relations" but adds the handwritten comment "with her superiors". In the same report the word "sometimes" is added in handwriting in brackets opposite the heading "has difficulties in dealing with people".

The AGAH Division made two reports on the complainant. The first covers September 1987 and the second the period from 1 October to 18 December 1987. The first says she "has difficulties in dealing with people" and adds: "She has occasional periods of negative attitude towards authority and dogmatic approach to work. She may without apparent personal consideration tactlessly interrupt or interfere with work or conversation". Although AGAH's second report marks the box "maintains good relations" and describes her "general conduct" as "good" it enters a similar reservation: though she is "generally very efficient and conscientious in her work, she occasionally becomes negative to authority and unnecessarily insistent or opinionated in her attitude about work matters".

Those are the reports mentioned in the Chief of AFPR's memorandum of 25 April 1989. All the other reports contain favourable assessments of her working relations and general conduct. As to the general assessment of her, two reports rate her "outstanding", seven "above average", one "good" and one "satisfactory".

7. Even though some difficulties were found in the complainant's attitude towards other staff, those reports do not show such a pattern of conduct as to impair the quality of her work on the assignments she was given. With two exceptions the reports answer yes to the question whether the division would re-employ her, and the two that say no do so not because of her conduct but because she is unable for medical reasons to use word-processing equipment.

8. The other two circumstances mentioned in the memorandum of 25 April 1989 are her unwillingness to undertake an assignment and "confrontations" between her and officers of the Personnel Division. But they cannot be said to have affected the quality of her work. What matters is the evidence of the quality of her work in the appraisals she got from the divisions in which she actually worked. Those other circumstances may be relevant to her general conduct but not to the quality of her work.

9. The conclusion is that the conditions in the case law for withholding an increment were not met and that the Organization committed a mistake of law in construing and applying 308.411. The complainant is therefore entitled to retroactive payment of the increment due to her at step XII in grade G.5 as from 1 June 1989. She is not, however, entitled to any damages for moral injury: even though the decision was unlawful, the injury was not serious enough to warrant any award under that head.

DECISION:

For the above reasons,

1. The Director-General's decision of 16 May 1990 is quashed.
2. The FAO shall pay the complainant the within-grade salary increment due to her at step XII in grade G.5 as from 1 June 1989, plus interest reckoned at the rate of 10 per cent a year.
3. Her claim to moral damages is dismissed.
4. The Organization shall pay her 2,000 Swiss francs in costs. In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. José Maria Ruda, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

Jacques Ducoux
Mella Carroll
José Maria Ruda
A.B. Gardner

