

TWENTY-SIXTH ORDINARY SESSION

In re ZEDNIK

Judgment No. 175

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Food and Agriculture Organization (FAO), drawn up by Mr. Friedrich Zednik on 29 December 1969 and brought into conformity with the Rules of Court on 28 January 1970, the reply of the Organisation dated 10 April 1970, the complainant's rejoinder dated 11 June 1970 and the Organisation's surrejoinder dated 28 July 1970, the medical reports dated 4 September 1965 and 20 April 1966 furnished by the respondent Organisation on 8 December 1970 at the Tribunal's request, the complainant's memorandum dated 12 January 1971, the Organisation's observations thereon dated 3 February 1971, and the complainant's communication dated 23 February 1971;

Considering Article II, paragraphs 2 and 5, of the Statute of the Tribunal and FAO Manual provisions 342.521, 342.524, 342.525 and 370.391;

Having examined the documents in the dossier, the oral proceedings requested by the complainant having been disallowed by the Tribunal;

Considering that the material facts of the case are as follows:

A. Mr. Zednik, a forestry expert of Austrian nationality, entered the service of FAO as a technical assistance expert on 10 January 1956. After completing several successive appointments he was assigned on 15 November 1960 to an afforestation project in Tunisia. His initial appointment of four years was renewed and would normally have expired on 15 February 1965. On 24 March 1964 Mr. Zednik, who was then fifty-nine years of age, was involved in a car accident in Tunisia while being driven in an official car on official duty. His injuries included broken ribs and fracture of the sternum.

B. After a period of sick leave lasting until 14 August 1964, the complainant resumed his duties in Tunisia. At the end of the year he underwent a medical examination which revealed that he was suffering from spastic bronchitic and it was recommended that he undergo a cure at Bad Reichenhall in the Federal Republic of Germany. However, he preferred to complete his mission first, and on 29 March 1965 he underwent an exit examination at FAO headquarters as a result of which he was found to be fit, although it was noted that he complained of respiratory difficulties and of heart trouble. He underwent a first cure at Bad Reichenhall from 10 April to 14 May 1965 at the Organisation's expense. Disappointed by the results of the cure, he lodged a claim for compensation with FAO on 16 May 1965. In his application he stated that he would have to undergo further cures in future and that owing to his serious partial incapacity he was unable to resume his normal activity in his own country. With the Organisation's consent he was examined at the University Clinic at Innsbruck and it was found that he was suffering from spastic emphysematous bronchitic with asthmatoïd dyspnoea. The Clinic's medical report dated 4 September 1965 found that this condition was a sequel of the accident and assessed the degree of incapacity at between 60 and 70 per cent, but stated that improvement could be expected as a result of appropriate cures. In the meantime negotiations had been in progress with a view to the possible reassignment of the complainant to an FAO project in Jordan. However, the FAO ultimately decided not to appoint the complainant to the post in question and arrangements were made for the final settlement of his case. It was decided to fix the date of the termination of his service retroactively at 14 May 1965, and to this end it was decided in November 1965 that the appointment which would normally have expired on 15 February 1965 had been extended to 14 May 1965, i.e. up to the date of the end of the complainant's cure at Bad Reichenhall. In December 1965 the FAO Medical Service recognised that the complainant was suffering from asthmatoïd dyspnoea as a consequence of the accident, involving temporary partial incapacity of 60 per cent, and recommended that he should undergo a second cure at Bad Reichenhall at the Organisation's expense before the final rate of invalidity was fixed. The complainant was accordingly awarded compensation on the basis of 60 per cent temporary incapacity and received payments amounting to US\$6,532 under FAO Manual provision 342.525 for the period between 15 May 1965 and 30 April

1966.

C. The second cure took place from 28 February to 26 March 1966 and was followed by a second medical examination at the Innsbruck University Clinic. The Clinic's report dated 20 April 1966 contained the following passage: "The findings of this check-up speak for a significant improvement of the vital capacity and a significant reduction of the bronchial obstruction, obviously due to the preceding treatment. It has to be accepted that no further improvement can be expected. The consistent therapy was of optimal result". It was noted in the conclusions of the report that the cure had resulted in a significant improvement in the pulmonary function, but the degree of incapacity was still assessed at between 60 and 70 per cent. After considering this report, the Organisation's Medical Officer reached the conclusion, on 25 August 1966, that there was still a mild depression of the chest bone and a mild asthmatoïd dyspnoea and that Mr. Zednik's condition must henceforth be considered stationary. As a result, he reduced the assessment of the degree of incapacity to between 20 and 30 per cent. The complainant's claim for compensation was referred to the Organisation's Advisory Committee on Compensation Claims (ACCC), together with the Medical Officer's report, and the Committee agreed that in order to determine whether annual compensation was payable or not, it was necessary to ascertain whether the complainant's earning capacity had been adversely affected by the car accident; the Committee therefore asked for some additional information. In reply to an inquiry on this subject, Mr. Zednik stated on 7 January 1967 that he was working in Tunisia under a bilateral aid programme of the Austrian Government, and when the Austrian Government was also consulted it stated that, although Mr. Zednik's contract contained no mention of any incapacity, since he had had an accident it had been agreed when the contract was entered into that Mr. Zednik would be employed mainly on theoretical work and would not be required to undertake any arduous field trips. On 16 April 1968 the ACCC recommended that the complainant's claim for annual compensation should be dismissed in the absence of any proof of loss of earning capacity and further recommended the award of a lump sum payment of US\$2,500 in compensation for the reduction of his pulmonary function. On 24 May 1968 the Director-General informed the complainant that he had accepted this recommendation. On 17 June 1968 Mr. Zednik accepted the lump-sum award of US\$2,500, but also asked that his claim for annual compensation should be reconsidered. On 1 August 1968 the ACCC recommended that this claim should be rejected and the Director-General informed the complainant on 20 August 1968 that he accepted this recommendation.

D. On 6 September 1968 Mr. Zednik lodged an appeal with the FAO Appeals Committee. In its report of 27 May 1969 the Appeals Committee recommended by a majority (one member having dissented) that the Director-General should meet the complainant's claim by making an *ex gratia* payment of US\$10,000, stating that it had arrived at this figure with due regard to all the factors in the case, including Mr. Zednik's loss of employment and earning capacity. By letter dated 3 September 1969, notified to the complainant on 13 October 1969, the Director-General indicated that he could not accept the Appeals Committee's recommendation and rejected the complainant's appeal. In support of his decision the Director-General explained: (1) that the Committee had been mistaken in considering that a third and independent expert should have been consulted, since Mr. Zednik had been entitled to request a third medical opinion and had not done so; (2) that in the case of a fixed-term appointment of the type held by the complainant there was no expectancy of automatic renewal; (3) that Mr. Zednik had worked for the FAO for nearly a year after the accident and had subsequently worked for the Austrian Government; (4) that the Appeals Committee had not recommended the granting of compensation under a specific Manual provision, but had merely suggested an *ex gratia* payment.

E. In his complaint to the Tribunal the complainant argues, in the first place, that it was improper for the Chairman of the ACCC (the member of the Appeals Committee who dissented from his colleagues' recommendation) to sit as a member of the Appeals Committee. He also claims that the Organisation had failed to observe Manual provision 342.525, that the Medical Officer wrongly based his recommendation on the short excerpt, cited above, from the second report of the Innsbruck University Clinic referring to a significant improvement of the vital capacity, instead of considering the report as a whole, and that in accepting the Medical Officer's recommendation the Organisation had based its decision on incorrect facts and had drawn conclusions which were clearly false. He adduces medical certificates issued up to 1970 by the Innsbruck University Clinic, a specialist in chest diseases of the Social Insurance Hospital in Ankara, and the doctor who supervised his cure at Bad Reichenhall to prove that his condition was by no means stationary, as claimed by the Organisation, but was deteriorating. He alleges that as a result of the incapacity due to the accident he was not reappointed by FAO up to the age of sixty-five, as would have been normal, and that it had become impossible for him to resume his duties as a Chief Forest Officer in the Tyrolean mountains. After the accident the Organisation had refused to offer him employment at FAO headquarters, first on the ground that there was over-representation of Austrians on the headquarters staff, and later, following representations to the same effect from the Austrian Government, on the ground that the complainant was

over sixty-two years of age. He claims that because the FAO had not treated him in an equitable manner, the Austrian Government, for humanitarian reasons, had organised a forestry project in Tunisia especially for the complainant under a bilateral agreement with that country. The complainant was responsible only for theoretical work under the project, as was proved by the fact that he was provided with an assistant for field work. His subsequent appointment in Turkey had also been specially organised for him by his own Government for the same reasons; moreover, he had been obliged to resign that appointment early in 1971 because of a deterioration in his health. There was therefore no justification for the Organisation to reduce the rate of his compensation on the ground of his subsequent appointments after his separation from the FAO. The fact was that he was now totally incapacitated for his profession of Chief Forest Officer.

F. Mr Zednik protests, further, at the termination of his employment in September 1965 with retroactive effect to 14 May 1965. In support of his contention that he had been re-engaged by FAO for the Jordan project and that his re-engagement had subsequently been cancelled, he quotes a letter received by him on 1 July 1965 from the Chief of the Field Operations Unit of the Forestry and Forest Products Division which stated that his candidature for the post in Jordan "which we shall now submit officially to the Government, will be considered favourably and accepted by the Jordanian authorities. The duration of the assignment is eighteen months. Very much will now depend, of course, on the outcome of the medical report requested by Dr. Reichensperger [the Organisation's Medical Officer]". He contends that his case should accordingly have been dealt with under Manual provision 370.391 concerning reinstatement in the event of reappointment within thirty days of the termination of the preceding appointment, and Manual provision 342.524 concerning salary adjustments for a staff member suffering from partial incapacity who remains in the employment of the Organisation but is reassigned to a post at a lower salary level. He concludes by asking the Tribunal to award him compensation for the period up to his sixty-fifth birthday, a sum equivalent to the loss of pension corresponding to four-and-a-half years of pensionable employment, and compensation for the repeated cures which he will have to undergo in future in the light of the medical findings.

G. The Organisation submits that the complainant's claims should be dismissed. The complainant's employment terminated on 14 May 1965 and he was not reappointed for the post in Jordan, and consequently the arguments he bases on Manual provisions 370.391 and 342.524 are not valid. The Organisation points out that there is no expectancy of renewal of a fixed-term contract and maintains that the decision assessing the rate of incapacity was taken after thorough examination of all the facts of the case, and in particular of the subsequent appointments of the complainant and of his age, to which some impairment of capacity is normally attributable.

CONSIDERATIONS:

As to the claim for the application of Manual provision 342.525:

Under this article:

"Where, upon the separation of a staff member, it is determined that, as a result of the injury or illness, he is partially incapacitated in a manner which adversely affects his earning capacity, he will be entitled to receive the proportion of the annual compensation provided for under paragraph 342.513 which corresponds to the degree of incapacity, assessed on the basis of medical evidence, and in relation to loss of earning capacity in his normal occupation or an equivalent occupation appropriate to his qualifications and experience."

Mr. Zednik claims that as a result of his service-incurred accident of 24 March 1964 his working capacity is impaired, and that as on its expiry on 14 May 1965 his contract with FAO was not renewed he is entitled to the annual compensation provided for under Manual provision 342.525 quoted above; consequently, he claims that the Director-General wrongly disallowed his claim for such compensation by the impugned decision of 3 September 1969.

As to the correctness of the proceedings before the Appeals Committee

On 27 May 1969 the Appeals Committee, without giving any precise opinion on the points raised by Mr. Zednik's request, merely proposed that he should be paid compensation, purely *ex gratia*. Consequently, although the Chairman of the Advisory Committee on Compensation Claims which examined the complainant's case before the Director-General's first decision refusing the complainant any entitlement under Manual provision 342.525 then sat as a member of the Appeals Committee, this irregularity is not, in the circumstances of the case, such as to taint

with illegality the Director-General's impugned decision.

As to the legality of the Director-General's decision of 3 September 1969

The Director-General's decision dated 3 September 1969 confirmed the decision taken by him on 24 May 1968 after consulting the Advisory Committee on Compensation Claims.

The Committee in question made its recommendation only after a thorough examination of the case, as a result of which the Tribunal is in possession of all the facts it needs to reach a decision. It is therefore unnecessary to call for an expert medical opinion.

In any case the dispute does not turn on the nature of Mr. Zednik's ailments, but solely on the rate of permanent partial incapacity resulting from them; the Innsbruck University Clinic, where the complainant received treatment, has assessed his incapacity at between 60 and 70 per cent, and the Organisation's Medical Service at between 20 and 30 per cent.

It appears from the evidence in the dossier that after the expiry of his contract with the FAO Mr. Zednik resumed employment in Tunisia under a bilateral assistance programme organised by the Austrian Government, which he would have been unable to do if he had been incapacitated to the extent of 60 per cent.

The Tribunal accordingly considers that the rate of incapacity assessed by the Medical Service of the Organisation is much more consonant with the evidence in the dossier. Moreover, the description of the complainant's ailments justifies the conclusion arrived at by the Medical Service that at least some part of these ailments is attributable to Mr. Zednik's age, and not to the sequelae of the service-incurred accident in 1964, for which he received all necessary treatment desired by him at the expense of the Organisation, including thermal cures.

In these circumstances, Mr. Zednik cannot be considered as suffering as a result of a service-incurred injury or illness from disability affecting his earning capacity; hence he does not meet the conditions laid down by the above-mentioned Manual provision 342.525 for entitlement to the annual financial compensation provided for under that provision. The Director-General was therefore justified in refusing to apply the Manual provision in question to his case.

As to the claim for the application of Manual provision 370.391:

Mr. Zednik contends that the rules laid down by Manual provision 370.391 were misinterpreted in his case.

It is however clear from the wording of the above-mentioned provision that it applies only to experts who have completed one mission and are required to carry out another. Mr. Zednik was never reappointed by FAO after the expiry of his contract on 14 May 1945.

It is true that the complainant claims that he was to have received a new appointment to serve under a programme in Jordan and that his candidature was finally refused because of the residual incapacity resulting from his service-incurred accident, although the Organisation refused to take account of that incapacity for the purpose of applying Manual provision 342.525.

Mr. Zednik had, however, no right to a new appointment, and he had received no formal offer of appointment, since the letter of 1 July 1965 on which he relies expressly stated that a satisfactory medical report was a prerequisite for his appointment.

Furthermore, it is clear from the evidence in the dossier, and specifically from a letter from the project Chief, that the reason for not appointing him to the Jordan project was his age, and not his partial incapacity, having regard to the strenuous work required of experts serving under that project.

As to the claim for application of Manual provision 342.524:

Mr. Zednik claims the benefit of Manual provision 342.524, but that provision applies only to staff members who have remained in the service of the Organisation and who are still working.

The complainant's claim that he was still serving as a staff member in September 1965 and that the termination of

his appointment as from 14 May 1965 was the result of an illegal retroactive decision is entirely contrary to the facts. Mr. Zednik's appointment was due to terminate on 15 February 1965, and he had received no promise of any extension or new appointment. The Organisation decided, however, of its own accord to extend his appointment up to 14 May 1965 in order to enable him to complete his report on his mission in Tunisia and also to undergo the cure which he wished to take to improve his health following his service-incurred accident; because of the administrative formalities required for this purpose it was not until November 1965 that the Organisation was able to inform the complainant that his appointment had been extended until 14 May 1965.

As a result of this voluntary action by the Organisation Mr. Zednik, who was well aware that his appointment expired on 15 February 1965, was considered to be still in employment up to the following 14 May, but at the latter date his connection with FAO was finally severed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 3 May 1971.

(Signed)

M. Letourneur
André Grisel
Devlin

Bernard Spy