

EIGHTY-SIXTH SESSION

In re Mentore-McKie

Judgment 1823

The Administrative Tribunal,

Considering the complaint filed by Mrs. Faye Mentore-McKie against the Food and Agricultural Organization of the United Nations (FAO) on 23 December 1997 and corrected on 18 February 1998, the FAO's reply of 13 May, the complainant's rejoinder of 13 July and the Organization's surrejoinder of 9 October 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

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

A. The complainant is a citizen of Guyana who was born on 15 September 1959. She joined the Office of the FAO's Representative at Port-of-Spain, in Trinidad, on the 19 October 1989. She was employed as a cleaner at grade G.1. Her original appointment was for a fixed-term of one year, but it was renewed several times, up to 30 March 1996.

By a letter of 30 May 1995 the Director of the Office for Coordination of Normative, Operational and Decentralized Activities (OCD) at headquarters, in Rome, told all the FAO's Representatives that in the context of reform the Administration had decided to amend the structure of the staff in the General Service category in country offices. For the Office at Port-of-Spain the intention was to have the complainant's job done by a cleaning company.

At a meeting on 22 June the acting Representative in Trinidad and Tobago told the General Service category staff of the plans for reform. By a letter of 27 June to the acting Representative the complainant said she hoped to go on working in the Organization, but in a less junior post, and she pointed out that she had been taking training courses and was willing to take more. On 10 July the acting Representative informed her that she was not well enough qualified for the FAO to keep her on. In a letter of 31 July to the recruitment section of the Personnel Division at headquarters she applied for any post for which she had the right qualifications and experience. By a letter of 22 August a personnel officer suggested that she should apply for any posts in the General Service category that might fall vacant.

By a letter of 30 November a personnel officer told her that her appointment would end at 31 December 1995 because of the reforms of the Representative's Office. He explained that the letter gave her the notice of separation that the FAO's Manual required. On 22 December 1995, however, the Director of OCD told the acting Representative by fax that her appointment had been extended to the end of February 1996.

On 19 January 1996 the complainant appealed to the Director-General against the termination of her appointment and asked for an appointment to a post as a programme clerk or any other vacant or reclassified post.

In a letter of 30 January 1996 to the Director of OCD she asked for redeployment within the reformed Office. By a fax of 5 February to the Director she asked for transfer to a post as programme assistant at grade G.6, still at Port-of-Spain. The Director of the Personnel Division answered on 6 February that she could be transferred only to a post at the same grade.

On 15 February the Director of Personnel acknowledged receipt of her appeal of 19 January. In a letter of 28 February a personnel officer of OCD told her of decisions to extend her appointment for the last time to 30 March 1996 and to abolish her post at 29 March. The personnel officer also said that she would be paid a dismissal indemnity under Staff Regulation 301.15. By a memorandum also dated 28 February the Office informed the General Service staff of three vacant posts: one for a programme clerk and secretary at grade G.4, one for an administrative clerk, also at G.4, and one for a G.5 secretary. On 12 March the complainant applied for the post of

administrative clerk.

On 1 July the Assistant Director-General in charge of Administration and Finance told her that her appeal of 19 January was rejected as devoid of merit, and she went to the Appeals Committee on 29 August.

On 28 November 1996 she applied for a post as programme assistant at grade G.6 in the Port-of-Spain Office. The local Selection Committee decided against having an interview with her on the grounds that she did not have the experience that the post required.

By a letter of 7 February 1997 the FAO's Representative told her that the headquarters Selection Committee had rejected her for the post of administrative clerk. She appealed against that decision to the Director-General on 16 April. In a letter of 10 June the Assistant Director-General in charge of Administration and Finance pointed out that by the time her letter of 7 February had reached him she was no longer a member of the staff; so her appeal was irreceivable under Staff Regulation 301.111.

By a letter of 7 May the complainant appealed to the Director-General against the decision not to interview her for the post of programme assistant. On 7 August the Assistant Director-General rejected that appeal on the grounds that it was irreceivable under Staff Regulation 301.111.

In the meantime, on 27 June 1997, the Appeals Committee had recommended rejecting her appeal of 29 August 1996 although it felt that, because she had tried to improve her lot and the quality of her services to the Organization, a "special effort" should be made to find her some other job. By a letter of 10 September 1997, which is the impugned decision, the Director-General told her that her appeal was rejected.

B. The complainant submits that the Organization acted unlawfully by showing prejudice and discriminating against her.

She says that the FAO's Office in Trinidad and Tobago overlooked her qualifications by telling headquarters that she was not fit for any post in the new administrative structure. She says that the interview she had on 22 May 1996 for the post of administrative clerk at grade G.4 was improper and that the Office ought to have considered her for the post of programme assistant at grade G.6 since she was more fully qualified for that post than for the G.4 one.

She contends that the decision not to renew her appointment after 31 December 1995 was unlawful because the FAO had not abolished her old post but had merely farmed out her work and ended her appointment. She says that she got no notice of dismissal.

In her submission the hearings before the Appeals Committee were flawed in several respects, in particular the inadequacy of the evidence.

She claims the quashing of the decisions which led to her termination and the award of damages for the injury that the Organization caused her while she was in its employment and after she had gone.

C. In its reply the FAO says that it complied with the material rules. Staff Regulation 301.091 says that the Director-General may terminate her fixed-term appointment if the Organization's requirements entail the abolition of the post or a reduction in staff. Manual paragraph 374.61 further provides that the appointment of a locally recruited member of the staff may be terminated on the grounds of abolition of post when no other suitable assignment is possible at the duty station. The Organization says that it deliberately terminated the complainant's appointment on 29 March, although it was to expire the next day, so that she would get termination indemnities. Besides, she had known since the staff meeting of 22 June 1995 that her post was to go.

The defendant submits that any claim made by the complainant and arising out of the rejection of her applications for the posts of administrative clerk and programme assistant is irreceivable because by the time she had notice of those decisions and challenged them she had left the staff.

In subsidiary argument the defendant challenges the complainant's pleas on the merits.

It rejects her contention that she was dismissed because of prejudice or was discriminated against.

D. In her rejoinder the complainant submits that it was the Organization's letter of 28 February 1996 that told her

for the first time that her post was to be abolished. On 30 November 1995, when it gave her notice of termination, the decision to abolish her post had not yet been taken. As to receivability she points out that, even if her appeals against the rejection of her applications were irreceivable on the grounds that she was no longer a staff member when she lodged them, all the information relevant to those applications is receivable because it has a bearing on her appeal of 19 January, when she was still on the staff. She enlarges on her pleas and presses her claims.

E. In its surrejoinder the defendant points out that it told her on 22 June 1995 that her post was to go. Though the decision did not take effect until some ten months later, the subcontracting of cleaning work required earlier contacts with a suitable firm. The Organization presses its pleas.

CONSIDERATIONS

1. In October 1989 the complainant joined the Office of the FAO's Representative - known as "the Representation" - at Port-of-Spain, in Trinidad. The Organization employed her as a cleaner at grade G.1 under a fixed-term appointment for one year which it renewed several times.
2. In May 1995 headquarters in Rome decided to revise the "staffing pattern" in the General Service category as part of an overhaul of the Organization's structure. One post picked out for abolition was the complainant's. At a meeting on 22 June the FAO's acting Representative at Port-of-Spain told the General Service staff there of the plans for reform. On 28 June he wrote to headquarters proposing, among other things, that "the post of Cleaner be replaced by contracted cleaning services".
3. By a fax message of 5 December 1995 the Director of the Office for Coordination of Normative, Operational and Decentralized Activities (OCD), in Rome, informed the acting Representative of the new "staffing structure" at Port-of-Spain. It showed that the Organization was to terminate the complainant's appointment.
4. By a letter of 31 July 1995 to the Personnel Division at headquarters the complainant had applied for "a post commensurate with [her] academic qualifications and experience". She said that she had an "undergraduate diploma" in natural science and a Bachelor of Arts degree in English from the Caribbean Union College, besides experience of teaching and some training in home economics. By a letter of 22 August 1995 a personnel officer at headquarters answered that she was not qualified for a position in the Professional category of staff because she did not have "at least three years of postgraduate work experience in a field of interest to the Organization", but she might wish to apply "when higher-graded General Service posts in the FAO Representation become open to recruitment".
5. By a letter of 30 November 1995 another personnel officer at headquarters warned her that it might prove "necessary to end [her] appointment on or before its not to exceed date of 31 December 1995". Yet in December 1995 the Director of OCD did grant her an extension of appointment, to 29 February 1996.
6. By a letter of 19 January 1996 she appealed to the Director-General against the termination of her appointment. She contended that she was a "victim of continuous discrimination" in that despite her years of service and her qualifications she had not been considered for suitable vacant posts. She wanted to be recommended for a post of programme clerk or any others she was deemed fit for.
7. In a fax letter of 5 February 1996 to the Director of the Personnel Division she asked for transfer to a vacant post for a G.6 programme assistant at Port-of-Spain, but in a fax reply of 6 February the Director said that "lateral transfer" must be at the same grade; but she was free, like anyone else, to apply for the vacancy.
8. By a letter of 28 February 1996 yet another personnel officer told her that, though the Organization was extending her contract to 30 March 1996, it would end her appointment on the 29th on the grounds of the abolition of her post.
9. By a letter of 1 July 1996 the Assistant Director-General in charge of Administration and Finance informed her that the Director-General had rejected as devoid of merit her appeal of 19 January 1996; he could not recommend picking her for any of the posts she wanted: "selection procedures", he explained, "were put in place for that purpose and the Organization is intent on observing them". On 29 August 1996 she lodged an appeal with the Appeals Committee against the decision of 1 July.
10. In its report of 27 June 1997 the Committee expressed sympathy but found no evidence to support her pleas of

discrimination and personal prejudice. She did not - it held - have the experience required for "the available vacancies in the Representation", and it recommended rejecting her claims as devoid of merit. But it felt that because of her "commendable efforts to improve her situation and her service ... during the past 7 years, a special effort should be made to try to find a position for her". By a letter of 10 September 1997 the Director-General dismissed her appeal as being without merit, and that is the decision she is impugning.

11. On 12 March 1996 she had applied for a G.4 post as administrative clerk and she was interviewed for it on 22 May 1996. By a letter of 7 February 1997 the FAO's Representative at Port-of-Spain told her that she had been unsuccessful, and against that decision too she appealed to the Director-General on 16 April 1997. On 10 June 1997 the same Assistant Director-General rejected her appeal on the Director-General's behalf as "not receivable and unfounded" and said that if she wished to go to the Appeals Committee she might do so, in accordance with Staff Rule 303.1313 and Manual section 331, within sixty days. She did not, however, appeal to the Appeals Committee.

12. She had applied for a G.6 post of programme assistant on 28 November 1996 but this time was not interviewed. On 7 May 1997 she appealed to the Director-General against the refusal of an interview and on 7 August 1997 the Assistant Director-General rejected her appeal as irreceivable, explaining again that she might appeal to the Appeals Committee. Again she did not do so.

13. In this complaint she seeks the quashing of "the decision(s) that led to or resulted in [her] separation" and an award of damages for injury sustained in the course of her seven years' service and since.

The scope of the complaint

14. The complaint properly relates only to issues arising out of the Director-General's decision of 1 July 1996, against which the complainant appealed to the Appeals Committee on 29 August 1996 and which the Director-General confirmed in his decision of 10 September 1997, the one now impugned. She may not challenge before the Tribunal the decision of 10 June 1997 to reject her application for the post of administrative clerk and the one of 7 August not to interview her for the post of programme assistant. According to Article VII(1) of the Tribunal's Statute -

"A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations."

Since the complainant failed to lodge appeals with the Appeals Committee against the decisions of 10 June and 7 August 1997 she has not exhausted the internal means of redress. To the extent that she is challenging those decisions her complaint is irreceivable because they are not final ones.

The lawfulness of termination

15. In support of her challenge to the ending of her appointment the complainant pleads that though the Organization purported to give her notice of termination in the personnel officer's letter of 30 November 1995 her post had not yet been abolished and the notice was therefore invalid. The Organization replies that the administrative action taken in the complainant's case strictly observed the material rules.

16. Staff Regulation 301.0912 empowers the Director-General to "terminate the appointment of a staff member with a fixed-term appointment prior to the expiration date for any of the reasons specified in Staff Regulation 301.091 or for such other reasons as may be specified in the letter of appointment". Regulation 301.091 allows such termination, among other reasons, "if the necessities of the service require abolition of the post or reduction of staff". Manual paragraph 374.61 states that the appointment of a locally recruited staff member - such as the complainant was - may be terminated "for abolition of post, no appropriate reassignment being available at the duty station". And Staff Rule 302.9033 reads:

"A staff member whose fixed-term appointment is to be terminated shall be given not less than 30 days' written notice of such termination or such notice as may otherwise be stipulated in the letter of appointment."

17. Though the complainant also relies on Regulation 301.0911 it does not apply to her case: it confers on the Director-General authority over and above that which he has under Regulation 301.091.

18. The FAO explains that for the complainant's own sake it took care not to let her contract expire at the scheduled

date, 30 March 1996; otherwise she would have forfeited her termination indemnity since according to Staff Rule 302.907 and Manual paragraph 374.5 someone whose contract merely expires is not entitled to such indemnity. Instead it terminated her contract on 29 March so that she would be entitled to the indemnity under Regulations 301.091, 301.0912 and 301.15.

19. The Tribunal is satisfied that the Organization complied with the rules. There was nothing unlawful about the notice it gave her in its letter of 30 November 1995. Although it warned in that letter that her contract might not be extended beyond 31 December it did later extend the contract to 30 March 1996. By a letter of 28 February 1996 it warned that there would be no renewal after 30 March and gave her notice that her contract would end on the day before the date of expiry. The purpose of doing so was to serve her interests by letting her get the indemnity.

20. The Tribunal does not accept the complainant's statement that before 28 February 1996 she herself was not told that her post was to be abolished. As early as 27 June 1995 she had written a letter to the FAO's acting Representative expressing the hope that her appointment "would not terminate with the sub-contracting of the cleaning duties" she was then performing; and again, in a letter of 10 July 1995 to a personnel officer at headquarters, she referred to "recent proposals to have the post of Cleaner ... offered to private contractors".

21. She submits that the FAO's decisions and behaviour "during the reorganisation exercise were prejudicial, discriminatory and unconstitutional" and "constituted violation of the conditions of [her] employment". But the Tribunal finds no evidence to support her allegations.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

Michel Gentot

Mella carroll

James K. Hugessen

A.B. Gardner