

EIGHTY-SIXTH SESSION

In re Odero-Ogwell

Judgment 1831

The Administrative Tribunal,

Considering the complaint filed by Mr. Lawi Andrew Odero-Ogwell against the Food and Agriculture Organization of the United Nations (FAO) on 18 August 1997 and corrected on 18 October 1997, the FAO's reply of 2 February 1998, the complainant's rejoinder of 3 April and the Organization's surrejoinder of 14 July 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, 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, a Kenyan who was born in 1936, joined the FAO in December 1968. In February 1987 it transferred him to Monrovia as its Representative in Liberia at grade D.1.

In July 1995 it had an audit done in the Representative's Office. The purpose was to look into charges of embezzlement of funds and equipment for a project, to assess the Office's performance and reputation and to carry out checks on financial and administrative operations. The undated report on the audit, which the Organization says came out in September 1995, cast doubt on the integrity of the complainant and his subordinates and accused them of fraud. It said that the Office's reputation was seriously impaired and it therefore recommended summarily dismissing the staff. A mission report dated 9 September 1995 and written by an operations officer who had just come back from Liberia bore out the findings of the audit report.

The FAO sent out three staff members to take over the Office while the enquiry was going on. They got to Monrovia on 17 September 1995. They let the complainant have a letter dated 12 September from the Director of the Office for the Coordination of Normative, Operational and Decentralized Activities (OCD). The Director asked the complainant on the Director-General's behalf to hand over to one of the three, whom he named, and to report at once to headquarters in Rome.

The complainant reported to headquarters on 22 September 1995. The Director of OCD gave him two memoranda dated 15 and 18 September. The first one said that the Director was proposing to the Director-General the dismissal of the complainant for serious misconduct, referred to "incidents" which "over the last few years" had cast doubt on the complainant's integrity and capacity for management, went into the report's findings in some detail, and gave him five days in which to answer the charges. The second memorandum was from the Assistant Director-General in charge of Administration and Finance and told him that he was suspended from duty without pay pending investigation.

He answered in a memorandum dated 29 September. He blamed his subordinates for anything that had gone wrong and said that they had taken him in. On 2 October he saw the Director of OCD, the chief of the Human Resources and Planning Service and a member of the Legal Office. On 3 October he sent to the Director of OCD an addendum to his reply of 29 September.

By a memorandum of 6 October 1995 the Assistant Director-General summarily dismissed him on the Director-General's behalf. The decision took effect the same day. A second audit report, dated October 1995, about a project supervised by the Office in Liberia confirmed poor management by the complainant and the possibility of embezzlement of project funds. He appealed against dismissal in a letter of 23 December 1995. The Assistant Director-General answered by a letter of 9 April 1996 that his claims were rejected, and he lodged an appeal against that decision on 15 June 1996.

In its report of 13 March 1997 the Appeals Committee held that he had "violated the rules and procedures of the Organization and abused his position for personal gain" and seriously damaged its reputation. It unanimously recommended rejecting his appeal. By a letter of 19 May 1997, which is the impugned decision, the Director-

General did so.

B. The complainant says that the FAO failed to tell him in explicit terms the charges levelled against him and prevented him from defending his interests. The charges in the letter of 15 September 1995 from the Director of OCD did not rest on any evidence. The letter of dismissal of 6 October was null and void because it failed to state what his misconduct had been.

He contends that the Organization dismissed him on evidence he was not informed of and in disregard of his arguments. He pleads breach of the *patere legem* rule on the grounds that it failed to comply with the material provisions of the FAO Manual. In his submission it is the Deputy Director-General, not the Assistant Director-General, who was empowered to recommend his dismissal to the Director-General. He maintains that at the very worst the FAO could have accused him of failing to uncover fraud committed by others. But that did not warrant summary dismissal. The penalty was therefore out of proportion, the more so since he had had a "long and exemplary career" and Monrovia was a hardship post.

In the complainant's view the dismissal rested on mistakes of fact and wrong findings and overlooked material evidence. The reference to earlier incidents which he believed to be over and done with was in breach of the double-jeopardy rule and amounted to abuse of authority. The charges were due to personal prejudice that management and some members of the staff bore him. One of them was a consultant who had once been his subordinate and who was on the audit team. The FAO was guilty of several "administrative irregularities" that show its bad faith. It failed to meet deadlines for answering his appeal against dismissal and refused to let him see all the relevant documents.

He claims the quashing of the impugned decision; payment of salary and allowances from the date of his suspension from duty; retroactive reinstatement in his post or in an equivalent one; referral of the charges against him to the Disciplinary Committee; disclosure of many documents; and awards of 100,000 United States dollars in moral damages and 15,000 dollars in costs, plus interest at the prevailing rate.

C. In its reply the defendant contends that the hardships of working in Liberia afford no excuse for the complainant's misconduct. It sets out in detail the charges against him and maintains that despite his seniority his summary dismissal was fully warranted. The charges were in clear and precise terms. Though the letter of dismissal did not repeat them it cited the letter of 15 September 1995 from the Director of OCD, which had given chapter and verse.

The complainant had the opportunity of defending his interests both orally and in writing. As for the evidence taken in his absence, there is no need for someone facing disciplinary charges to be present when evidence is given. According to Manual paragraph 330.141 it is for the Assistant Director-General in charge of Administration and Finance to recommend dismissing a grade D.1 official. The consultant whom the complainant refers to was not a member of the audit team but accompanying it so as "to clarify his role in the management of project".

D. In his rejoinder the complainant maintains that the defendant has failed both to explain the charges against him and to discharge the burden of proof. He contends that, according to the edition he has of the Manual, it is for the Deputy Director-General to recommend sanctions against a grade D.1 official, and he accuses the defendant of letting him have a wrong version of the Manual.

E. In its surrejoinder the Organization maintains that the evidence of the complainant's guilt was "overwhelming" and that it observed due process. It points out that he had been warned that the earlier incidents were a source of "continuing concern" to it and that "his performance as FAO Representative [would] continue to be closely monitored". Lastly, it explains that he is referring to an out-of-date version of Manual paragraph 330.141.

CONSIDERATIONS

1. The complainant is impugning a decision of 19 May 1997 by the Director General of the FAO to accept the Appeals Committee's recommendation of 13 March 1997 and reject his internal appeal against his summary dismissal from the Organization on 6 October 1995.

2. The complainant had been the FAO's Representative in Liberia since 1987, except for a period of some eighteen months in 1991-92 when civil strife in that country forced the evacuation of all United Nations personnel. He ran the FAO's Office at Monrovia, which consisted of four permanent staff: himself, a programme assistant, an

administrative assistant and a secretary. In May 1993 and again in May 1995 he was given written warnings regarding irregularities in the conduct of the Office for which he was responsible.

3. In July 1995 the Organization sent an internal audit team to Liberia. The team conducted an in-depth review of the Office accounts and records and followed up its findings of many discrepancies by speaking to local witnesses who had dealt with the FAO. The internal audit report, issued in September 1995, describes in detail the corruption of the Monrovia Office and its staff, including the complainant. A second report, issued by the team in October 1995 - after he had been dismissed - focused on the Office of Special Relief Operations (OSRO), a project which lasted from April 1994 to June 1995 and the purpose of which was to distribute hand tools and seeds free of charge to local farmers. While the first audit report summarised fraudulent and negligent conduct by the complainant and his staff in respect to the OSRO project, their practices were examined in greater and more damning detail in the second report.

4. On 17 September 1995 a special FAO mission arrived in Monrovia and took over the FAO's Office and bank account. The complainant was given written instructions from the Director of the Office for the Coordination of Normative, Operational and Decentralized Activities (OCD) to report immediately to headquarters in Rome. Upon his arrival in Rome he was given two memoranda dated 15 and 18 September 1995. The first memorandum was written by the Director and detailed the allegations against him. It informed him of the Director's intention of recommending to the Director-General that he be summarily dismissed for serious misconduct. The second memorandum, which was from the Assistant Director-General in charge of Administration and Finance, said that, in accordance with Staff Rule 303.03, he was suspended without pay pending the investigation. In keeping with Manual paragraph 330.325 he was given five working days to answer the charges against him.

5. On 29 September the complainant provided a thirteen-page memorandum in reply to the charges in which he asserted essentially that he had not been aware of the frauds and irregularities practised in his Office and that his subordinates, upon whom he had relied, had been responsible for them.

6. The complainant attended a meeting on 2 October 1995 with the Director of OCD, the chief of the Human Resources and Planning Service and a representative of the Legal Office. At that meeting his reply to the allegations was discussed. After the meeting he submitted a further memorandum of reply.

7. Neither his two memoranda nor his oral presentation were found convincing. On 6 October 1995 he was informed that the Director-General had approved his summary dismissal. He appealed to the Director-General and then to the Appeals Committee. The Committee's report of 13 March 1997 recommending the rejection of his appeal was approved by the Director-General on 19 May 1997. That is the impugned decision.

8. The complainant's entire case against the impugned decision is based upon alleged procedural irregularities. While he purports to reserve his right to make submissions on the merits of the case against him, it is noteworthy that he has not actually done so. Even the memorandum which he prepared in response to the initial charges does not seek to deny that serious financial irregularities and frauds were being committed in the Office which he ran and through the bank account for which he was signatory; instead the memorandum seeks to cast the blame on subordinates and to plead that he was too busy with his other duties to be able to detect and put an end to the frauds. It is for the complainant to present his case as he sees fit, but in the circumstances the Tribunal is unable to give effect to the "reserve" of his right to make a complete defence to the charges at some later time. The Tribunal will decide the case on the material before it.

9. The complainant's specific procedural pleas are all clearly without merit.

10. He says that the FAO failed properly to specify the charges against him. It is enough to read the memorandum of 15 September 1995 from the Director of OCD to the complainant to see that it sets out in no uncertain terms the allegations against him and provides specific examples of the alleged misconduct.

11. The complainant then states that the FAO failed adequately to give its reasons for summarily dismissing him. Here again, it is enough to read the Organization's memorandum of 6 October 1995, which refers to the memorandum of 15 September 1995 and states that, following the meeting of 2 October and consideration of all the material, the Director-General had concluded that the frauds and misconduct were such as to "gravely jeopardise the reputation of the FAO". That memorandum was more than adequate to inform the complainant of the reasons for dismissal.

12. Next he says that the Organization violated his right to make full answer and defence. While there is no doubt that such right exists, it is perfectly clear that the complainant in this case was given full opportunity to exercise such right and in fact did so. He was invited to reply to the charges against him and submitted a detailed memorandum fully setting out his position. He was then allowed the opportunity to explain and discuss his position with senior staff representatives. He was given copies of all the material which was in due course submitted to the decision-maker. After his dismissal on 6 October 1995 he was afforded full procedural protection in his appeal to the Appeals Committee, and the decision of the latter not to grant him a hearing did not impede his right to present his case fully in writing, as he in fact did. His submission that he was not permitted to examine the witnesses interviewed by the audit team is misleading: those witnesses were not examined by anyone in the decision-making structure and the decision was based solely on the reports of interviews conducted by members of the team. The substance of those reports was made available to the complainant in the audit team report and if he wished to examine any of those witnesses he was of course quite free to do so.

13. The complainant argues that the severity of the sanction imposed was disproportionate to the alleged misconduct. Given the evidence of deep-rooted fraud and corruption in the Office for which he was responsible, the misconduct was serious and the sanction fully justified.

14. Likewise the complainant's submission that the impugned decision is based on errors of fact, omission of relevant facts and wrong conclusions is simply incompatible with the uncontradicted and overwhelming evidence.

15. The complainant submits that the impugned decision violates the double-jeopardy rule since the memorandum of 15 September 1995 mentions the two previous matters that had given rise to the letters of May 1993 and May 1995, which had been placed on his personal file. He wrongly takes the view that those prior incidents had been settled and wiped from the record by the writing of the letters in question. In fact, it is clear that the two letters were warnings which were properly placed on his file and were relevant to his conduct and to the allegations made against him in September 1995.

16. Finally, the complainant urges that the audit team was tainted with bias against him because one of the members of the team had been the international consultant on the OSRO project and the complainant had had to inform him at the conclusion of that project that his contract would not be renewed by the FAO. This is drawing a long bow indeed. Other than the complainant's own assertions there is absolutely no evidence of bias on the part of the person concerned, whose role was in any event far removed from that of the ultimate decision-maker. The allegation of bias is inherently improbable and has no foundation in fact.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 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