

NINETY-NINTH SESSION

Judgment No. 2478

The Administrative Tribunal,

Considering the complaint filed by Mr J.A.C. against the Food and Agriculture Organization of the United Nations (FAO) on 10 June 2004 and corrected on 1 July, the FAO's reply of 12 October, the complainant's rejoinder of 18 November 2004 and the Organization's surrejoinder of 14 January 2005;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Portuguese national born in 1957, was recruited by the FAO as a Finance/Administrative Officer at grade P-4 in the Regional Office for Latin America and the Caribbean, located in Santiago (Chile), under a three-year fixed-term appointment with effect from 1 May 2001. This appointment was subject to satisfactory completion of a one-year probationary period.

In a memorandum dated 9 August 2001 from the Director of the Personnel Division of the Administration and Finance Department, the complainant was informed that the World Food Programme (WFP) had communicated to the FAO information about his employment in the WFP's Country Office for Afghanistan between 8 November 1996 and 31 October 1997 and his alleged misappropriation during that period of two cheques (amounting to 44,818.07 United States dollars) that had been made out to the WFP. They were allegedly deposited into his personal bank account and the money subsequently withdrawn by him. He was reminded that as a newly recruited staff member of the FAO, his probationary period was governed by Staff Regulation 301.0913* and Manual paragraph 305.5241** and he was given five days to respond to the allegations. He was further informed that consideration would be given to terminating his appointment during probation for "non-suitability for the International Civil Service" if he failed to provide a satisfactory explanation. In view of the functions he was supposed to perform at the FAO, his access to the Organization's financial systems was suspended. The complainant replied to the accusations at length in a memorandum dated 17 August 2001, saying that he had never received any documents from WFP substantiating their accusations, and he denied having been in possession of the two cheques in question.

In correspondence that ensued the FAO elaborated on its accusations and sent the complainant photocopies of relevant documents – cheques and disbursement vouchers – as documentary evidence that he had indeed signed for the two cheques in question on 13 June and 21 July 1997. The complainant asserted that the signature on these documents was not his but a forged one and he provided the FAO with a report prepared by a forensic document examiner to support his assertions. Following further correspondence between the FAO and the complainant, the latter was informed in a memorandum dated 23 November 2001 from the Director of the Personnel Division that it had been decided "to separate [him] from service in the interests of the Organization". It was stressed that the decision was based on questions concerning his suitability for the International Civil Service under Manual paragraph 305.5241 and that the termination of his probationary appointment was in accordance with Staff Regulation 301.0913; it was clarified that the decision was based on discretionary authority and not on any disciplinary measure.

In a letter of 20 February 2002, the complainant appealed against this decision to the Director-General. On 22 April the Assistant Director-General in charge of Administration and Finance replied that his appeal had been rejected. On 17 June 2002 the complainant filed an appeal with the Appeals Committee. In its report dated 20 November 2003, it noted having examined *in camera* several documents it had requested from the Organization and having heard the parties. The Committee found that the Organization was in possession of documents and information affording grounds for the measures it had taken concerning the complainant and that the decision to terminate his appointment was not tainted with procedural irregularities. It suggested that the FAO take "measures to ensure that the relevant provisions of [the FAO] Manual [...] be adhered to in future" and it recommended rejecting the appeal.

The Director-General informed the complainant on 10 March 2004 that he had accepted the Committee's recommendation. That is the impugned decision.

B. The complainant points out that there are many discrepancies in the documents which have been used as "proof" that he misappropriated funds and he contends that his signature on these documents has been forged. He also points out that there is no signature even closely resembling his on the photocopies of the two cheques in question that were produced by the Organization. He notes that the signatures said to be his on documents supplied to the FAO by the WFP were considered to be "of dubious authenticity" in an analysis carried out by a forensic expert.

He argues that according to the Tribunal's case law it is the Organization's responsibility to prove, with incontrovertible evidence, the truthfulness of its allegations. Although the FAO says that it has "proof" that the complainant personally picked up the cheques in question, he maintains all it has is a signature that has been demonstrated to be false; it has failed to provide any sort of signed statement from the office where the cheques originated proving that it was the complainant who had picked these up. He notes that, according to the documents sent to him by the Organization, one of the cheques in question was issued for one year's office rent owed by the WFP, yet the FAO has offered no proof that a second cheque had to be issued to prevent eviction of the WFP operation. The FAO alludes to "certain other documentary evidence" that establishes his guilt. However, his counsel's request to view this evidence has been denied. The complainant submits that this breaches the Tribunal's case law as well as a general principle of law followed in both civil and common law jurisdictions.

He contends that he was never given the grounds or justification for the decision to terminate his probationary appointment; he was only told that the Organization had wide latitude to take such types of discretionary decisions. He queries how his suitability could be questioned just a few months after his recruitment, particularly as it was never questioned when he was employed with the WFP.

He claims two and a half years' salary, pecuniary damages of 20,000 dollars for dismissal without justification and for the mental anguish suffered, compensation of 20,000 dollars for the difficulty in finding new employment as well as for the losses suffered in relocating to Santiago for only six months, and legal expenses of 25,000 dollars.

C. In its reply the Organization explains that it has submitted ample information to the complainant about his misappropriation of the two cheques, which it says called into question his integrity and suitability for the "position of trust" for which he had been recruited. Furthermore, he has been unable to rebut the charges made against him. It says it has "incontrovertible evidence" of the complainant's misappropriation of funds. The FAO contends that, in the face of such detailed charges, the normal course of action would have been for the complainant to submit bank statements to show that the cheques were not deposited into his personal account and that he did not withdraw the corresponding amounts, but he had chosen not to do so. Should the Tribunal find the Organization's position to be insufficiently substantiated, then it would be prepared to submit the information it provided to the Appeals Committee, on the condition that such information be reviewed *in camera* to protect the confidentiality of third parties.

It reiterates that the decision to terminate his appointment was not taken as a disciplinary measure; the Director-General took it within a framework which affords him "a wide measure of discretion in assessing the complainant's integrity and suitability" for the position he occupied. It submits that the decision was taken in accordance with all applicable rules and procedures and in the interests of the Organization.

The FAO asserts that the Inspector-General of the WFP had investigated the matter and that repeated attempts were made to obtain reimbursement of the misappropriated sums. It notes in this regard that the complainant offered in March and April 2001 to repay the sums in question, though he never did so.

The Organization considers that, since the forensic expert was chosen by the complainant, his opinion "is of no evidentiary value". According to the Office of the Inspector-General of the FAO, the signatures in question are clearly those of the complainant. It would be, however, prepared to accept that a further analysis of the signatures be undertaken; if the Tribunal were to deem this necessary, the Organization asks that an expert be appointed under Article 11(1) of the Tribunal's Rules.

D. In his rejoinder the complainant notes that he had applied for his post with the FAO two years before his appointment began; that gave the Organization ample time to check with the WFP about his suitability for the post.

He maintains that the Organization has offered no proof of its allegation that he deposited the cheques in question into his personal bank account and that it has refused to allow him to see the “secret documentation” which is part of its “incontrovertible evidence”.

He submits that the FAO has not evaluated in good faith any of the evidence he has provided. For example, it has ignored his observation that the two cheques in question contain the signatures of other staff members, but not his. Instead, it offers memoranda that he was the one to request and pick up the cheques; the complainant denies that it is his signature on these memoranda. Furthermore, the Organization continues to question the opinions stated by two independent forensic experts whom he consulted concerning the validity of his signature, yet it accepts what was concluded by its own Inspector-General, who is not a forensic expert and who has helped to formulate the charges against him.

Concerning his offer to repay the sums, he contends that he did so in an attempt to stop the harassment he and his family were suffering; he was willing to say or do anything to regain peace of mind.

E. In its surrejoinder the FAO reiterates its offer to provide further information to the Tribunal for review *in camera*. It maintains that the decision to terminate the complainant’s probationary appointment was not taken as a disciplinary measure and it was in conformity with the applicable rules and procedures. The Organization submits that “an exceptional situation and exceptional circumstances” arose in the case at hand and the statutory provisions allow the Director-General to terminate a probationary appointment in order to deal with situations of this nature.

The Organization does not find it “plausible” that the complainant would offer to repay the amount in question “simply to be left at peace”. The FAO says that it has compared the signatures on the documents in question against those on a number of documents in its possession; the Office of the Inspector-General of the FAO, which, the Organization points out, has expertise in the forensic analysis of documents, has issued a report concluding that these signatures are clearly those of the complainant.

CONSIDERATIONS

1. The complainant was recruited by the FAO for a high profile position with delicate financial/fiduciary responsibilities. During his probationary period the Organization received from the WFP information concerning a serious accusation that had been brought against the complainant relating to his conduct in a previous post with the WFP. The FAO confronted him with the charge and a rather lengthy investigation and debate with him ensued, which concluded with his employment being terminated “in the interests of the Organization” and for “non-suitability for the International Civil Service”.

The charges that were investigated dealt, in essence, with an alleged misappropriation of a very large sum of money in his position with the WFP.

2. Only one of the allegations of the Organization against him is convincing, yet it is sufficient to justify the decision to terminate his probation as a non-disciplinary measure. It is the fact that the complainant offered twice to reimburse the money that he was accused of having misappropriated. The amount was so large (44,818.07 United States dollars) that his contention that he was acting only to buy his peace of mind is wholly incredible and the Organization could not possibly fail to act on the implied admission of guilt.

3. The other “facts” relied on by the Organization have not been proved and the FAO has not observed the most elementary rules of due process. Nor can the Tribunal, without itself breaching such rules, accept the offer to hear evidence against the complainant secretly and outside his presence.

4. Nevertheless, as already indicated, the complainant’s implied admission of guilt was ground enough to sustain the conclusion that “the interests of the Organization” did not lie in following through with the complainant’s probationary appointment given that he held a position of trust on financial matters, and dealt with sensitive issues. This is a discretionary decision for which the Tribunal cannot substitute its own, when sufficient and reasonable grounds are given, as is the case here.

So, it is not for the Tribunal to yet again have analysed by an expert whether the signatures are true or false, nor to receive other evidence, as suggested by the Organization.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 May 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

James K. Hugessen

Agustín Gordillo

Catherine Comtet

 *Staff Regulation 301.0913 states: “In the case of staff members serving a probationary period [...], the Director-General may at any time terminate the appointment on finding that such action would be in the interests of the Organization.”

 **Manual paragraph 305.5241 states: “Confirmation of the appointment of staff members at Headquarters and in offices away from Headquarters is dependent upon satisfactory completion of their probationary period including such elements as (i) satisfactory performance of the duties and responsibilities assigned to them, and (ii) satisfactory conduct and suitability for the International Civil Service [...].”