

107th Session

Judgment No. 2818

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms L. R. against the Food and Agriculture Organization of the United Nations (FAO) on 7 November 2007 and corrected on 20 December 2007, the Organization's reply of 22 April 2008, the complainant's rejoinder of 17 June, corrected on 25 July, and the FAO's surrejoinder of 6 November 2008;

Considering Articles II, paragraph 5, and VII 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. FAO Staff Regulation 301.9.1 provides that the Director-General may terminate the appointment of a staff member who holds a continuing appointment if the necessities of the service require abolition of the post or reduction of staff. Staff Regulation 301.9.11, which deals with agreed termination of an appointment, adds that:

“The Director-General may also, in exceptional circumstances, terminate the appointment of a staff member who holds a continuing or a fixed-

term appointment if such action would be in the interest of the good administration of the Organization and in accordance with the standards of the FAO Constitution, provided that the action is not contested by the staff member concerned.”

The complainant, who has dual Kenyan and Italian nationality, was born in 1945. She joined the FAO on 4 August 1980 under a short-term appointment. With effect from 1 November 1984 she was employed as a Statistical Clerk at grade G-3 in the Fishery Information, Data and Statistics Unit. Her appointment was extended on a regular basis until it was converted to continuing status on 1 May 1985.

By a letter dated 27 April 2004 from the Director of the Human Resources Management Division the complainant was informed that, as the result of a programme reduction within the FAO, her post had been identified for abolition and she was invited to consider an agreed termination of her appointment. After a period of negotiation the complainant accepted the termination of her appointment, with effect from 1 April 2005, on terms and conditions that were contained in a letter of agreement dated 30 August 2004. The letter gave her formal notice of termination and quantified the final emoluments payable to her by the FAO, which included a termination indemnity of 12 months of her net base salary, an additional payment equal to 25 per cent of that indemnity, a cash payment in lieu of a statutory three-month notice period and an amount of 94,670 euros due under a Separation Payments Scheme for General Service Staff (hereinafter “SPS”). The letter further stipulated that the amounts given were approximate and that they were “subject to computerisation and to any possible variation in the Rome General Service salary scale”. The complainant signed the letter on 31 August 2004.

Six working days before the effective date of the termination of her appointment, the complainant was verbally informed that a material error had been made in the FAO’s calculation of the amount due to her under the SPS. This information was confirmed to her in writing by a Personnel Officer in a letter dated 1 April 2005, which advised her that the correct amount was 77,576.70 euros. In an e-mail of 5 April to the same Personnel Officer the complainant requested

retroactive reinstatement as a full-time staff member on the grounds that her consent to the termination of her appointment was no longer valid due to the material error. She added that the revised amount did not reflect the Organization's "actual offer" and that the amount of that offer had strongly influenced her decision to accept an agreed termination of her appointment. The Personnel Officer explained in a memorandum of 15 April 2005 that the amount payable to staff members in the General Service category under the SPS is calculated in accordance with Manual paragraph 314.6.5 (i.e. by multiplying a fraction of the staff member's net base annual salary at the time of separation by the number of years of service), and that because it is "made up of salary which has accrued to the staff member over time", it is not open to negotiation. In the complainant's case, an error had been made because the Organization had calculated the SPS payment using 1 January 1975 as her entry-on-duty date, instead of 4 August 1980. Even though the letter of 30 August 2004 provided for payment of a different amount, this did not affect the validity of the agreement because the payment due under the SPS was not one of its "essential elements". On 19 April the complainant indicated that she was willing to examine other proposals. The Personnel Officer confirmed the Organization's position in writing on 25 April.

The complainant wrote to the Chief of the Management Support Service on 16 August asserting that she had accepted the termination of her appointment in good faith based on the final emoluments listed in the letter of agreement of 30 August 2004. She noted that the Director-General has the discretion to grant up to 18 months' salary as part of an agreed termination and she requested that he exercise his discretion to consider granting her three months' salary in addition to the 15 months' salary that she had been offered. In his reply of 2 September 2005 the Chief of the Management Support Service stated that his records showed that the complainant had accepted the termination of her appointment before knowing the amount payable to her by the FAO, and not, as she alleged, on the basis of the amounts indicated in the letter of agreement. He concluded that no additional payment could be made and pointed out that this was a reiteration of a

decision that had been communicated to her in writing on 15 and 25 April 2005.

In an undated “letter of appeal” to the Director-General, which was received on 24 October, the complainant again requested an additional three months’ salary. On 16 December 2005 the Assistant Director-General in charge of the Administration and Finance Department dismissed her appeal as time-barred and unfounded. She lodged an appeal against this decision on 27 February 2006. In its report of 7 February 2007 the Appeals Committee considered that her appeal was receivable and recommended, *inter alia*, that the Organization recognise that a “gross error” had been made and that it pay the complainant compensation in the amount of three months’ net base salary. By a letter dated 30 July 2007 the Director-General informed the complainant that he did not accept the Committee’s conclusions and recommendations and that, consequently, he was rejecting her appeal. That is the impugned decision.

B. The complainant submits that she signed the letter of agreement believing that the FAO had correctly calculated the final emoluments due to her. Relying on those calculations, she made financial commitments which she now has difficulty meeting. Moreover, pursuant to the Staff Regulations the Director-General has the discretion to offer her an additional three months’ salary. In her view, her proposal to this effect was a fair solution to the problem, given that her legitimate expectation of receiving the full amount stipulated in the letter of agreement would not be met by the Organization. She also believes that the FAO’s dismissal of her appeal was unjust.

The complainant seeks payment of the full amount of the final emoluments stipulated in the letter of agreement of 30 August 2004.

C. In its reply the FAO contends that the complaint is irreceivable under Article VII, paragraph 1, of the Statute of the Tribunal. The administrative decision which the complainant impugns was contained in the letter of 1 April 2005. The subsequent communications of 15 and 25 April merely reiterated or confirmed that decision. She should have lodged an internal appeal within the time limit prescribed

by Staff Rule 303.1.311, and because she failed to do so her appeal was not receivable. Moreover, although in her submissions to the Appeals Committee the complainant argued that she had lodged her appeal within ninety days of her memorandum of 16 August 2005, according to the Tribunal's case law the time limit for lodging an appeal is not extended as a consequence of settlement proposals made by a staff member.

On the merits the FAO argues that the final emoluments payable to the complainant upon her separation were calculated in accordance with the Staff Regulations. A payment under the SPS concerns any staff member in the General Service category based in Rome, irrespective of the conditions of separation from service, and the amount is dependent upon the staff member's length of service. Consequently, it was not part of the agreed termination of her appointment *per se*, but was instead a non-negotiable part of the remuneration due to her at the time of her separation. Furthermore, in the Organization's view, the amount of the payment under the SPS did not influence the complainant's willingness to accept an agreed termination, because the evidence shows that she had already made her decision before she was advised of the exact amount of that payment.

The Organization submits that the complainant may have had prior knowledge of the material error. Indeed, in 2000 she had requested and received an advance amounting to 20 per cent of her accrued entitlement under the SPS. In these circumstances it is unlikely that she was unaware that the figure shown in the letter of agreement was based on an incorrect number of years of service. On the contrary, she should have noticed the "patent disproportion" between her period of service and the sum that was being proposed to her under the SPS.

Citing the case law, the FAO argues that the Administration made a purely material error which it was entitled to correct. As the Staff Regulations provide for the right to recover overpayments, *a fortiori*, it is entitled to rectify a material error before any disbursements are made. In addition, the letter of agreement stipulated that the amounts given were approximate.

The Organization also considers that the evidence produced by the complainant does not establish that she made specific financial commitments as a result of her reliance on its erroneous calculation of the amount due to her under the SPS.

Regarding the complainant's claim for an additional three months' salary, the FAO submits that its current practice is that the Staff Regulation providing authority for this is applied only to staff members who are 55 years or less at the effective date of the termination of their appointment under Staff Regulation 301.9.11. The complainant does not fit into this category and there is no reason why she should have been treated more favourably than similarly situated staff members.

D. In her rejoinder the complainant argues that her complaint is receivable because she lodged her internal appeal within ninety days of receiving the letter of 2 September 2005 by which her 16 August proposal for a solution was rejected. She refutes the Organization's contention that she had prior knowledge of the material error. She contends that the payment under the SPS is an integral part of the agreed termination because it is part of the total sum that forms the financial part of the agreement. In addition, she asserts that the Director-General has exercised his discretion to grant up to a maximum of 18 months' salary in individual cases where the staff members concerned were over 55 years of age.

E. In its surrejoinder the Organization maintains its arguments. It emphasises that the letter of 2 September 2005 simply confirmed and reiterated the FAO's position as set out in the communications of 15 and 25 April, both of which referred to the letter of 1 April 2005.

CONSIDERATIONS

1. Pursuant to the FAO's Staff Regulations the complainant agreed to the termination of her appointment on terms and conditions that were contained in a letter of agreement which she signed on 31 August 2004. It was indicated in the letter that part of the final emoluments due to her from the FAO included a payment of

94,670 euros under the SPS and that the total sum owed to her, excluding payment of any unused annual leave, was 154,787 euros. It was also specifically stated that the amounts given were “approximate [and] subject to computerisation and [...] variation [...]”.

2. On 1 April 2005 the complainant was informed in writing by a Personnel Officer that due to a material error in the calculation of the payment due to her under the SPS, the sum owed to her by the FAO excluding any unused annual leave, was 139,129 euros instead of 154,787 euros. The error had occurred as the result of using 1 January 1975 as her date of entry on duty when in fact it was 4 August 1980; consequently, the payment due under the SPS was 77,576.70 euros. In an e-mail of 5 April 2005 to the same Personnel Officer the complainant declared that the agreed termination was therefore not valid and requested to be reinstated retroactively.

3. On 15 April 2005 the Personnel Officer replied that the error had been made in the calculation of the amount due under the SPS as a result of which the letter of agreement contained a “manifestly inflated figure” of 94,670 euros for that concept, “mistakenly increased by € 17,094”.

He further noted that in 2000 the complainant had requested and was paid an advance of 20 per cent of the 52,736.38 euros that had, at that time, accrued to her under the SPS, and “[i]t would have been extraordinary for the balance of [her] accrual under the SPS to have increased by more than 100% in a little more than four years”.

Moreover, he pointed out that a payment under the SPS “is made up of salary which has accrued to the staff member over time and, therefore, is not subject to negotiation”. The fact that a mistaken amount was stated in the letter of agreement did not affect the validity of the agreement. Consequently, the balance owed to her under the agreement was approximately 99,298 euros and would be paid to her shortly.

On 19 April 2005 the complainant indicated that she was prepared to examine other proposals. On 25 April the Personnel Officer

reiterated the earlier decision of 1 April that had been repeated on 15 April.

4. On 16 August the complainant wrote to the Chief of the Management Support Service noting that she had accepted the terms of the agreed termination in good faith and requesting that the Director-General exercise his discretion to pay her another three months' salary. Her request was rejected on 2 September 2005.

5. The complainant subsequently lodged an undated appeal, which the Organization received on 24 October 2005 and rejected as being time-barred on the grounds that the decision regarding the adjusted amount payable to her under the SPS was made on 1 April 2005.

6. The Appeals Committee found her appeal to be receivable and recommended an award of three months' net base salary. However, the Director-General rejected the appeal as time-barred and without merit.

7. In its reply the Organization submits that the complaint is likewise time-barred. It also submits that if the Tribunal were to consider the complaint, it should dismiss it as devoid of merit because the calculation of the amount due under the SPS is not subject to negotiation.

8. The complainant explains that she made financial commitments based on the final emoluments stipulated in the letter of agreement and that she has now difficulty in meeting them. She states that she was "initially paid an amount of Euro 36.377.08" as an advance and she wants the Organization to pay her the rest of the sum "agreed upon in the letter of agreement signed by both parties".

9. She argues that her complaint is receivable because the decision of 2 September 2005 was a new decision and her appeal with

respect to that decision was brought within the prescribed time limits. In Judgment 2011 the Tribunal stated the following:

“A decision made in different terms, but with the same meaning and purport as a previous one, does not constitute a new decision giving rise to new time limits [...], nor does a reply to requests for reconsideration made after a final decision has been taken [...].”

The request formulated by the complainant on 16 August 2005 was for an “extra three months salary” on the basis that it would “make up about half of the loss” incurred as a result of the error in the original calculation. The request was directed to the same subject matter as was the decision of 1 April 2005, a decision that had been maintained on 15 April and, again, on 25 April 2005. It was maintained again on 2 September 2005 when the complainant was informed that “no additional payment [could] be made”. There having been no new decision after 1 April 2005, the complainant’s internal appeal was time-barred and it follows that her complaint is irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 May 2009, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Agustín Gordillo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Mary G. Gaudron
Agustín Gordillo
Dolores M. Hansen
Catherine Comtet