*Registry's translation, the French text alone being authoritative.*

**FORTY-SIXTH ORDINARY SESSION**

# *In re* VYLE

**Judgment No. 462**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the Food and Agriculture Organization of the United Nations (FAO) by Miss Margaret Elizabeth Vyle on 8 August 1980, the FAO's reply of 22 October, the complainant's rejoinder of 5 December 1980 and the FAO's surrejoinder of 16 January 1981;

Considering the applications to intervene filed by:

Mrs. Odile Billiet-Belluomini,
Mrs. Phyllis Raye-Mariani and
Mrs. Marcella Torchi-Giuri;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Regulation 301.135 and FAO Staff Rule 302.3033 as in force in 1955, FAO Staff Regulation 301.135 and FAO Manual sections 308.344 and 308.3454 as in force in 1972 and FAO Staff Regulation 301.135 and FAO Manual sections 308.344 and 308.3454 as in force in 1976;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant joined the staff of the FAO in 1955 as a grade G.3 shorthand-typist. Her mother tongue is English. In February 1972 she passed a language proficiency examination in Spanish and was granted a language allowance. At the time a staff member receiving such an allowance was relieved of the obligation of undergoing a further test every five years provided that his supervisor certified that his proficiency in the language was satisfactory. From 1 January 1976, however, everyone was required to take the further test every five years. Anyone who failed did not have the allowance discontinued at once but could try again the following year. The complainant failed the five-yearly test in February and June 1977 and again in January 1978, and payment of her allowance was discontinued on 1 March 1978. She failed yet again in June 1978. She had been paid an allowance for proficiency in French since 1964 and passed the test in French again in May 1980. On 7 June 1978 she appealed to the Director-General. Her appeal was dismissed and on 16 July she appealed to the Appeals Committee. The Committee recommended rejecting her appeal and on 13 May 1980 she was so informed. That is the final decision impugned.

B. The complainant observes that when she was first granted the language allowance there was no need for staff members to take the five-yearly test provided that their supervisor certified that their proficiency in the foreign language in their work was satisfactory. The allowance forms part of pensionable remuneration. She therefore has an acquired right to it. Secondly, the new rule requiring five-yearly tests in all cases was retroactive and, being applied in some cases and not in others, discriminatory. The only reason why she had to comply with the new rule was that in her case the five-year period ended after 1 January 1976, the date when it came into force. Thirdly, she objects to the completely new system of examination, which makes use of impersonal methods such as recording on tape. Besides, the examination is now stiffer. After all, she points out, her supervisor was satisfied with her proficiency in Spanish, a language she uses constantly and therefore knows at least as well as when she took the original examination. Lastly, it is arbitrary to change the criterion from that of use to that of knowledge of the language, and the FAO is the only organisation which requires retesting.

C. In her claims for relief the complainant asks the Tribunal to order the FAO to restore her language allowance, plus interest, for Spanish with effect from 1 March 1978, the date on which it was discontinued, and to accept her

supervisor's certificate of her proficiency in the use of Spanish in her work for the continuation of payment of her language allowance.

D. In reply to the complainant's plea on the ground of acquired rights the FAO observes that her letter of appointment was subject to "any subsequent modifications to the Staff Regulations and the Staff Rules11. At the time of her appointment Staff Rule 302.3033 provided that staff members in receipt of a language allowance might be "required to undergo further tests at intervals of not less than five years in order to demonstrate their continued proficiency in the use of" the two working languages. In 1972, when she obtained the language allowance for Spanish, Staff Regulation 301.135 provided that the allowance should be payable to "General Service staff members who pass an appropriate test and demonstrate continued proficiency in the use of two or more approved languages". Manual section 308.344 provided that tests would be held every five years unless the supervisor certified that the staff member's proficiency in the language was satisfactory. Manual section 308.3454 stated that payment of the allowance would cease if the staff member failed the further test. The five-yearly test became compulsory in 1976 and after that date a certificate from the supervisor was no substitute. It is immaterial that the allowance forms part of pensionable remuneration since if that fact alone were enough to create an acquired right to the allowance it could never be discontinued. If the argument is that she acquired a right to continuing application of the rules which were in force when she was first paid the allowance, it is at odds with the Tribunal's well-established case law, which is that acquired rights arise only from provisions in force at the time of appointment. The complainant has therefore no acquired right to a certificate from her supervisor, since certificates were not introduced until 1970 and were done away with in 1976. Moreover, that is quite clearly not a provision "of decisive importance". It is mistaken to argue that the rule introduced in 1976 was retroactive: anyone who was being paid a language allowance and in whose case the five-year period ended after 1 January 1976, when the new rule came into force, had to take the test again. There is nothing discriminatory about not requiring officials in the translation and editorial services to take a test since obviously such officials have to have language qualifications. The new method of examination may be upsetting for older staff members, but anyone who fails may use the FAO's up-to-date training facilities. The complainant therefore had an opportunity to practise the new methods. The examination is no stiffer than it was before and many recipients of the allowance have passed it. In any case the test in Spanish is no harder than the test in French; yet the complainant easily passed the French test the first time. She is mistaken in relying on her supervisor's view that her work in Spanish is satisfactory. The criterion of proficiency is all-round knowledge, not use, of the language. The FAO did away with supervisors' certificates - as it had discretion to do - because supervisors were setting different standards. It is untrue to say that the FAO has made the examination harder so as to save on language allowances. Whatever system other organisations apply, there is nothing arbitrary about making continuing proficiency a condition of entitlement. The FAO therefore invites the Tribunal to dismiss the complaint as unfounded.

E. In her rejoinder the complainant repeats her argument that she has an acquired right to the continuing application of the rule which was in force in 1972, when she first passed the test in Spanish. The certificate from her supervisor was therefore adequate. The allowance formed part of her pensionable remuneration and as such is an essential term of her contract with the FAO. Its cancellation, though not notified to her until 11 April, took effect from 1 March 1978 and was retroactive: it was therefore a double breach of her rights. Since she has lost the allowance, her pension will be no higher than that of a member of the General Service category who has never been paid the allowance and therefore never paid the correspondingly bigger contributions to the pension fund. Nor will her repatriation benefit take account of the fact that for six years she received the allowance. Her pension contributions based on the allowance will therefore be forfeit and at the very least should be repaid with interest. It would be administratively sensible to apply the criterion of use of a language rather than knowledge of it, particularly since her work in Spanish is mainly editorial. Whatever the FAO may say, she fared less well than others in whose case the five-year period ended not later than 31 December 1975 and who therefore went on receiving the allowance for another five years without having to undergo a further test. The tests have been made more difficult and FAO officials axe being discriminated against within the United Nations common system. The FAO rules are absurd because someone who passes the test goes on receiving the allowance even if he never uses the language, whereas she has lost her allowance even though she is still making regular and satisfactory use of Spanish.

F. In its surrejoinder the FAO rejects the argument that Manual section 308.344 runs counter to the staff regulations: in fact it merely regulates the application of Staff Regulation 301.135. The sentence in Manual section 308.344 allowing a certificate from the supervisor, which was deleted in 1976, related to a "subordinate" matter and cannot be regarded as constituting an essential condition of payment of the allowance. The complainant has not put forward any sound legal argument to show any acquired right. The discontinuance of the allowance on 1 March

1978 was not retroactive since she first failed the test in February 1977. There was clearly no inequality of treatment between staff members in whose case the five-year period ended before 1 January 1976 and those in whose case it ended after that date. The latter were not in the same position. The argument about pension contributions is irrelevant. The FAO cannot be held liable for any loss in her pension rights if the discontinuance of her allowance was not unlawful. Any application for repayment of contributions should be addressed to the United Nations Joint Staff Pension Fund. Her arguments about the criterion of proficiency - use or knowledge - are also irrelevant since they relate to the question, not whether the rules are lawful, but whether they are appropriate. Comparison with other organisations is irrelevant. Lastly, Mrs. Billiet-Belluomini's application to intervene is irreceivable since she is not in the same position as the complainant: she refused to take the test in English because she obtained a degree in English from a French university and is employed as an English-language secretary.

CONSIDERATIONS:

1. The complainant is impugning the decision dated 13 May 1980 rejecting her application for a language allowance for Spanish. She invites the Tribunal to order the FAO:

(a) to restore her language allowance for Spanish, plus interest, with effect from 1 March 1978, the date on which it was discontinued;

(b) to accept her supervisor's certificate of her proficiency in the use of Spanish in her work so as to continue payment of her language allowance.

Mrs. Odile Billiet-Belluomini, Mrs. Phyllis Raye-Mariani and Mrs. Marcella Torchi-Giuri have filed applications to intervene.

2. When the complainant joined the staff of the FAO on 6 March 1955 the payment of the language allowance was governed by the following basic text in FAO Staff Regulation 301.135:

"Language allowance. The Director-General shall establish rules under which extra payment may be made to General Service staff members who pass an appropriate test and demonstrate continued proficiency in the use of two or more official languages..."

Furthermore, Staff Rule 302.3033 reads:

"Staff members in receipt of a language allowance may be required to undergo further tests at intervals of not less than five years in order to demonstrate their continued proficiency in the use of two official languages."

3. In 1972, when the complainant passed the language test in Spanish, the basic rule, Staff Regulation 301.135, was still in force. It was supplemented by new Manual sections 308.3441, 308.3442 and 308.3454, which had amended the provisions relating to demonstration of continued proficiency in a language by providing that instead of passing the test the official might have his supervisor certify such proficiency.

4. When the complainant failed the test in 1977 and in 1978 Staff Regulation 301.135 was still in force, but Manual, sections 308.3441 and 308.3454 had been amended in 1976. Thereafter only by passing the test could the official prove continued proficiency, and it was no longer possible to prove it with a certificate from the supervisor. As to the discontinuance of the allowance, Manual section 308.3454 was applicable. It read as follows:

"308.3454 Discontinuation of payment. If a staff member fails the proficiency test required under the provisions of paragraph 308.3441, payment of the language allowance ceases automatically from the first day of the month one-year following that on which he is notified of his failure, unless he demonstrates proficiency in the intervening period in a subsequent examination."

5. According to the Tribunal's present case law, an acquired right is a right the grant of which was of decisive importance to the staff member when he accepted an appointment with the organisation. The possibility of obtaining a language allowance under certain conditions is not ordinarily a matter of decisive importance to a new recruit. - It is therefore not an acquired right in the sense just indicated. But the notion of acquired rights should be developed to take account of situations analogous to those which gave rise to the doctrine. When a staff member has earned the right to an allowance under the rules in force, it would be inequitable for the rules to be arbitrarily altered so as to deprive him of it. In this sense a staff member may be said to acquire the right to the allowance

under the terms of the rules in force at the time when he earned it. This does not mean that every detail of the rules must be maintained; it means that they must not be changed so as to amount to an arbitrary deprivation.

6. In this case it was at all times a condition of the continued payment of the allowance that the staff member should be able to demonstrate continued proficiency. It was also at all times the rule that such proficiency should be demonstrated by tests at intervals of not less than five years. At the time when the complainant obtained the allowance there was a modification of this latter rule so as to make a certificate of proficiency by a supervisor a substitute for the five-year test. The complainant did not acquire a right in any sense to the continuance of this alternative. The essential condition for continued payment is continued proficiency. The method by which such proficiency is to be ascertained is not of the essence. The alteration of method by the Director-General with the result that the complainant, because she failed to pass the test, was deprived of the allowance does not constitute an arbitrary deprivation of an acquired right.

7. Since the complaint is dismissed, the applications to intervene also fail.

DECISION:

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment by Mr. André Grisel, President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Assistant Registrar of the Tribunal.

Delivered in public sitting in Geneva on 14 May 1981.

(Signed)

André Grisel
Devlin
H. Armbruster

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.