

FORTY-NINTH ORDINARY SESSION

In re FLORIO

Judgment No. 541

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Food and Agriculture Organization of the United Nations (FAO) by Miss Carlotta Florio on 1 February 1982 and brought into conformity with the Rules of Court on 1 March, the FAO's reply of 20 May, the complainant's rejoinder of 26 July and the FAO's surrejoinder of 14 September 1982;

Considering Article II, paragraph 5, of the Statute of the Tribunal, FAO Staff Regulations 301.091, 0912 and 0941 and FAO Staff Rules 302.4131, 622, 9021, 9023 and 907;

Having examined the written evidence and disallowed the complainant's request for the hearing of a witness;

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

A. The complainant, a United States citizen, began a series of short-term contracts with the FAO on 23 April 1979 after providing a health certificate from a doctor in Rome. The FAO's Medical Service examined her on 31 August and gave her a provisional medical classification pending further examination. On 15 February 1980 the Chief Medical Officer advised, because of her history of back trouble and spinal surgery, renewing her appointment only after a full medical examination. In March 1980 she was chosen for a post carrying a "continuing" appointment, but for want of medical clearance was given only a fixed-term one to 30 June. On 25 April she provided a report from her own doctor, Dr. Minkoff, in New York. On 14 May the Chief Medical Officer reported that she was medically unfit for a continuing appointment. Her contract was renewed until 31 December 1980 so that she could make other arrangements, and she then left the FAO. Her appeal to the Director-General against the non-renewal being rejected, on 5 December she submitted her case to the Appeals Committee. On 10 December she asked the Director-General to convene a medical board to review the medical facts of her case. This, too, being refused on 23 December, was referred, on 30 December, to the Committee. In its report of 8 June 1981 the Committee was split, but a letter of 2 November from the Deputy Director-General said that the Director-General had, on the recommendation of the majority, decided that her "separation from service" was valid and that there were no grounds for convening a medical board. She is challenging that decision, which she states was notified to her on or after 3 November 1981.

B. The complainant has two main pleas. (1) Her separation was "termination for health reasons" and the procedure for such termination was not followed. Nothing in the rules made the conversion of her appointment to a continuing one subject to new medical clearance, nor was she so warned until there was word of the continuing appointment. She had already obtained medical clearance and has an unconditional right to such an appointment, in expectation of which she entered into private commitments. Besides, her employment could not be terminated for health reasons - as it was - in disregard of Rule 302.9021, which permits termination only if staff members' "physical ... condition or extended illness render them incapacitated for further service". A risk of disability does not suffice. (2) The procedure was irregular, as indeed the minority of the Appeals Committee found. The majority did not give due weight to the views of Dr. Minkoff, an orthopaedic surgeon of international repute, who challenged the Medical Service's views and whose impartiality the Chief Medical Officer unjustifiably questioned. An outside physician, Dr. Valenti, whom the FAO consulted, does not have the expertise of Dr. Minkoff and never actually examined the complainant. Relying on Rule 302.9023⁽¹⁾ or, subsidiarily, on 302.622⁽²⁾, the complainant argues that it was arbitrary to refuse to convene a board. She asks the Tribunal to quash the decision to terminate her employment on 31 December 1980 and order her reinstatement in the continuing post with effect from 1 January 1981; alternatively, to quash the decision not to convene a medical board and order the convening of a board and, subject to the board's finding her fit, her reinstatement in the continuing post with effect from 1 January 1981; failing such reinstatement, to award her three years' salary; and to award her costs.

C. In its reply the FAO argues that since the complainant's appointment was not terminated the procedure in Rule 302.9023 for termination for health reasons did not apply. The relevant rule is 302.907: "separation as a result of

the expiration of [a fixed-term] appointment shall not be regarded as a termination of appointment ..." There was therefore no termination, let alone an irregular one. Besides, when she left the complainant was not considered to be "incapacitated for further service". Rule 302.4131 requires: "appointment shall be dependent upon certification by the ... Chief Medical Officer ... that the candidate's health meets the Organization's prescribed standards for employment". It is thus the Organization which sets the standards of health it requires - with regard, if it wishes, to the risk of future disability - and the Chief Medical officer who grants or withholds clearance. In March 1980 the complainant had clearance only for short-term employment, and since she never met the health requirements for a continuing appointment she got only a fixed-term one. Recounting the events leading up to her medical classification, the FAO contends that the procedure was not irregular and that the delay in the classification was her own fault. There is no evidence that the Chief Medical Officer was moved by any extraneous factor or that the decision was partial or mistaken. The disagreement between him and Dr. Minkoff did not require the convening of a medical board. Rule 302.622 is irrelevant, being related to sick leave. The Director-General's decision not being tainted with any flaw which warrants setting it aside, the claims for relief are unfounded.

D. In her rejoinder the complainant maintains that since there were reasons of health for not extending her appointment she was entitled to have those reasons reviewed in accordance with a fair and objective procedure. Rule 302.4131, on which the FAO relies, did not make her appointment of March 1980 subject to further medical clearance. She contests the FAO's account of the events leading up to her medical classification and invites the Tribunal to hear a witness to corroborate her own version. In particular she maintains that not until 11 April 1980 was she asked to provide a report by Dr. Minkoff, and she rejects any blame for the delay in her classification. The wording of Rule 302.622 makes it clear that it does not apply solely to matters of sick leave. The different views expressed by her own doctor afforded reason enough to convene a board. She appends a report by a New York neurosurgeon, based on an examination of her on 9 June 1982, which states that she should be able to perform any type of work for the rest of her days without any limitations.

E. In its surrejoinder the FAO develops its arguments and again invites the Tribunal to dismiss the complaint as unfounded. In particular it again rejects the allegation that the complainant's employment was terminated for reasons of health. In fact, as is clear from the evidence, she had a fixed-term appointment and it simply expired. The FAO rejects her objections to its account of the history of her claims and answers comments made in her rejoinder on several points of fact. It observes that the report by the New York neurosurgeon does not contain data which would lead it to alter its medical classification of the complainant. To express a definitive opinion on that report its medical service would have to review her whole medical file.

CONSIDERATIONS:

1. The complainant was recruited by the FAO on a shortterm contract commencing on 23 April 1979 and ending on 30 June 1979. In June 1979 her contract was extended to 13 September 1979. On 31 August 1979 she was examined by the FAO Medical Service, and the complainant gave a history of a disc removal operation in February 1972 and an operation for disc fusion in March 1973. The examining doctor's comment was that the long history of low back pain was thought to have originated in an accident sustained by the complainant when she was 10 years old; that the disc removal was only partially successful and was followed by disc fusion; and that the complainant had learnt back strengthening exercises, which she did, and only rarely suffered back pain. The examining doctor came to the conclusion that, although the complainant was well at the time of her examination, she could not get medical clearance until the Organization had a full report from her own doctor.

In September 1979 the complainant was given another short-term contract expiring on 16 March 1980. In that month she applied and was recommended for a continuing appointment and on 11 April 1980 she was examined by another FAO doctor, who required her to submit a written report on her medical history from her orthopaedic surgeon in New York, Dr. Minkoff. Dr. Minkoff's report was sent and stated in part:

"She was last seen on October 26, 1979 prior to her assignment in Rome. At this time, she was able to walk without a limp, bend over and touch toes, squat and walk, heel and toe walk with normal deep tendon reflexes in knees and thighs, negative straight leg raise and negative Patrick test with good range in the spine."

On 14 May 1980 Dr. Helander, the Chief Medical Officer, informed the complainant that Dr. Minkoff's report did not satisfy the Medical Service and that she should undergo supplementary examination by consultants in Rome. On 5 June 1980 the complainant was examined by the Chief Medical Officer, who requested an X-ray examination for his assessment.

This material - Dr. Minkoff's report, the X-ray pictures and the Chief Medical Officer's conclusions - was placed before Dr. Valenti, who did not examine the complainant. His findings were as follows:

"My opinion is that there is a very high risk for recurrence of the back disorder. If there would be a recurrence no more surgical intervention can be advised, and thus only conservative therapy would be available.

Conservative therapy would have very unreliable results, and thus there would at any recurrence be a very high risk for disability.

It is because of these future risks, not because of her present functional state, that I have advised Dr. Helander and Dr. Caso that the risks for Ms. Florio are so high that I would not recommend her employment."

On 13 June 1980 the complainant was classified "unfit for employment", and she was subsequently informed that her employment with the FAO would expire on 31 December 1980. She appealed to the Director-General against the decision to separate her from the Organization and on 10 December 1980 she requested the Director-General to convene a medical board in connection with the refusal of medical clearance for a continuing appointment. The FAO did not accede to her request.

On appeal to the FAO Appeals Committee the three members forming the majority rejected the complainant's request that her medical classification be revised and that a medical board be convened. The two members forming the minority filed a dissenting opinion expressing the view that the Appeals Committee was not competent to judge the case on medical grounds without first recommending that a medical board be convened.

2. FAO Staff Rule 302.622 provides as follows:

"When there is a serious difference of opinion on the medical facts relating to staff members' ability to perform their duties, or regarding sick leave under these rules, the Director-General may, if circumstances so warrant, refer the matter to an independent medical practitioner or to a medical board for advice."

The FAO contends that the rule does not apply to the complainant's case because the question here is not the complainant's ability to perform her duties or her entitlement to sick leave, but rather her medical clearance for a continuing appointment. The FAO relies on Staff Rule 302.4131, which provides:

"Appointment shall be dependent upon certification by the Organization's Chief Medical officer, on the basis of the results of a medical examination, that the candidate's health meets the Organization's prescribed standards for employment..."

The FAO's position as stated by the Chief Medical Officer before the Appeals Committee is that there is no appeal from what in effect was a pre-employment medical examination, which was relatively long in completion for want of all available information.

The FAO Staff Rules in regard to the medical assessment of staff members clearly deal with two separate and distinct situations. Rule 302.4131 contemplates medical examination prior to appointment and makes certification by the Chief Medical Officer a condition precedent to appointment to a post in the Organization. Rule 302.622 contemplates medical examination after appointment where the question of the staff member's ability to perform his duties or his entitlement to sick leave has arisen. In the particular circumstances of this case the Tribunal need not consider whether these rules apply.

3. In the report of the Appeals Committee the following passage appears at page 3:

"The Chief Medical Officer stated that the initial classification '1-B' above-mentioned was a provisional classification made pending the availability of a full report which had been requested. The views of the Appellant's personal physician were not bound to be impartial and objective in the circumstances." (Emphasis added)

This latter statement was also referred to in the opinion of the dissenting members of the Appeals Committee, who interpreted it as showing an element of partiality on the part of the Medical Officer.

The only inference to be drawn from the Chief Medical Officer's comment is that he considered the opinion of Dr. Minkoff, an orthopaedic surgeon whose professional competence is not in doubt, to be one on which reliance could

not be placed. He has not identified the circumstances which would militate against Dr. Minkoff expressing impartial and, objective views, either because he is the complainant's personal physician or for any other reason. There is nothing in the dossier to justify the Chief Medical Officer's unfortunate statement.

The employment practices provided for in the FAO Staff Rules require that a medical assessment should be fair. In this case the Chief Medical officer refused to accord to Dr. Minkoff's medical opinion the serious and thorough consideration it deserved. He thus took insufficient account of an essential fact, and, although the impugned decision was a discretionary one, it suffers from a defect which the Tribunal will take into consideration.

The complainant is therefore entitled to relief. The relief can take the form of re-instatement, which is one of the remedies sought by the complainant, or the payment of compensation, which is an alternative remedy sought. In the circumstances of this case, the latter solution appears more desirable, and the Tribunal accordingly decides to award the complainant ex aequo et bono damages amounting to 12,000 United States dollars.

DECISION:

For the above reasons,

1. The FAO shall pay the complainant damages amounting to 12,000 United States dollars.
2. The FAO shall pay the complainant \$2,000 as costs.
3. The other claims for relief are dismissed.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Sir William Douglas, P.C., Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 18 November 1982.

André Grisel

Jacques Ducoux

William Douglas

A.B. Gardner

1. The provision states that before termination for health reasons the staff member "may request that a medical board be convened to advise the Director-General on the medical aspects of the case".
2. "When there is a serious difference of opinion on the medical facts relating to staff members' ability to perform their duties ... the Director-General may, if circumstances so warrant, refer the matter to an independent medical practitioner or to a medical board for advice."