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

FIFTY-SIXTH ORDINARY SESSION

In re SADEK

Judgment No. 680

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Food and Agriculture Organization of the United Nations (FAO) by Mr. Tarek Sadek on 4 December 1984, the FAO's reply of 21 February 1985, the complainant's rejoinder of 27 March and the FAO's surrejoinder of 9 May 1985;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, FAO Staff Rules 302.4062 and 302.40631 and FAO Manual provisions 311, 319 and 331;

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. On 16 April 1974 the FAO appointed the complainant, who is Egyptian, under a special services agreement.[(1)] He was given further such appointments and then, from 1 June 1975 short-term appointments, from 1 June 1976 fixed-term appointments and from 1 January 1980 a continuing one. He was an intervener in Mrs. Clegg-Bernardi's case (Judgment 505). On 29 October 1982 he asked the Director-General to apply to his case the Tribunal's ruling in Judgment 506 (in re Hoefnagels) and grant him non-local status. His claim was turned down and he appealed to the Director-General on 14 April 1983. The claim having been refused, he appealed to the Appeals Committee on 14 July 1983. His claim was finally rejected on 10 September 1984, and that is the decision he impugns.

B. The complainant seeks to rebut the objections the FAO raised to receivability in the internal proceedings. He observes that the purpose of his internal appeal was to obtain non-local status by virtue of the Tribunal's ruling in the Hoefnagels case, not just to challenge the original decision taken in 1976 when he got a fixed-term appointment that ought to have carried non-local status. He cites examples of several cases in which he says the FAO treated claims like his own as receivable.

As to the merits, he contends that it was against the rules for the Director-General to employ him under special services agreements and that he was unlawfully denied non-local status and the incidental benefits. Once he had completed 12 months' continuous service -- by April 1975 -- he ought to have been given a fixed-term or continuing appointment under the Staff Rules. The process for recruiting him began before 29 October 1974, the date the Tribunal treats as critical. He asks that he be given the same treatment as others in like circumstances who have been granted non-local status.

He claims non-local status as from 16 April 1974 in accordance with Manual provision 311 and the benefits prescribed in the Manual and Article 302.4062 of the Staff Rules as in force at the time of his original appointment. He invites the Tribunal, should it declare the special services agreements valid, to order that he be granted non-local status as from 30 May 1975, the date on which he began a continuous period of 12 months' service under short-term appointments. He seeks 2,200 United States dollars in costs.

C. In its reply the FAO observes that the complainant did not claim non-local status until over six years after he had completed twelve months' service under short-term appointments. The basis for his internal appeal of 29 June 1983 was a situation established as early as 31 May 1976, and the appeal was clearly time-barred and irreceivable. As the defendant the Organization may decide whether or not to object to receivability.

As to the merits, the FAO discusses the Tribunal's decisions in Judgments 505 and 506 and contends that they do not apply to the complainant, employed as he was under special services agreements. In concluding such agreements the Director-General correctly exercised his discretion. The complainant does not satisfy any of the conditions for the grant of non-local status. In particular he did not have such status at the time when the new rules

came into force, and he did not get his first short-term appointment until several months after October 1974: he had no expectation of non-local status, not even being a member of the staff at the material time and being therefore in a quite different position from that described in Judgment 506. The FAO maintains that the complaint is irreceivable and subsidiarily that it is devoid of merit.

D. In his rejoinder the complainant seeks to show that his complaint is receivable, contending that the time limits prescribed in Manual provision 331 were complied with and observing that the Appeals Committee declared his appeal receivable. He believes that at the material time he did belong to the staff because the special services agreements were unlawful and unsuited to the functions he was asked to perform: he was performing administrative duties classified in the Manual as General Service work and had indeed been performing them since first joining the Organization. He presses his claims.

E. In its surrejoinder the FAO observes that the Director-General is not bound by the Appeals Committee's views on receivability and that even if it finds in the official's favour the FAO is free to disregard its recommendation where, as in the present case, it has sound reasons for doing so.

As to the merits the FAO submits that, being employed under special services agreements, the complainant was not a staff member at the material time and was therefore not in the same position in law as Miss Hoefnagels. It develops the pleadings in its reply and again invites the Tribunal to dismiss the complaint.

CONSIDERATIONS:

Receivability

1. Article VII(1) of the Statute of the Tribunal stipulates that a complaint shall not be receivable unless the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations. It is not enough to exhaust the internal means of redress; the internal time limits must be observed. If the staff member failed to lodge his internal appeal in time his complaint to the Tribunal will be irreceivable.

But the staff member may ask the Administration for review either where some new and unforeseeable fact of decisive importance has occurred since the decision was taken, or else where the staff member is relying on facts or evidence of decisive importance of which he was not and could not have been aware before the decision was taken. If either condition is fulfilled the Administration is under a duty to review, and even if the time limit was originally not respected, the new decision will set a new one. The staff member who observes the new time limit may in turn submit a complaint to the Tribunal.

2. The complainant is at present employed by virtue of a decision to give him a continuing appointment as from 1 January 1980, which does not confer the non-local status and benefits he is claiming. He did not challenge the decision until 29 October 1982, long after the time limit for appeal had expired.

There has, however, been a new and unforeseeable fact of decisive importance since 1 January 1980. In Judgments 505 and 506, which it delivered on 3 June 1982, the Tribunal held that the Director-General had adopted a rule in pursuance of decisions taken by the FAO Council in November 1974. The rule draws a distinction between two groups of General Service category staff. Those who held short-term appointments before the end of October 1974 and had or might have been informed of their eligibility for non-local status were to continue to qualify for such status by satisfying certain conditions determined by practice. Those who were appointed later were subject to Staff Rule 302.40631 and were to qualify for non-local status only if they had held it by 31 January 1975 and had since continued in service. Though neither published nor even communicated to the staff as a whole before the Tribunal delivered its judgments, the rule greatly altered the position of staff in the General Service category, and the Tribunal's formulation of it amounted to a new and unforeseeable fact of decisive importance which put the FAO under a duty to entertain a request for review.

After the Tribunal's judgments had come to his knowledge the complainant correctly followed the internal appeal procedure. On 29 October 1982 he asked the Director-General to grant him the benefit of the Tribunal's ruling in Judgment 506. This being refused, on 14 April 1983 he asked the Director-General to take a final decision, and the Director-General rejected his claim again on 14 June 1983. He appealed to the Appeals Committee. On the Committee's recommendation the Director-General rejected his appeal on 10 September 1984. The complainant has therefore exhausted the internal means of redress, and respected the time limits, and his complaint is receivable.

3. It is immaterial that he was an intervener in the unsuccessful suit filed by Mrs. Clegg-Bernardi. Someone who intervenes in a complaint does so on account of his interest in the outcome: he may rely on the rights of a successful litigant in whose case he intervenes, but he may still file a complaint of his own even if that case should fail.

Merits

4. The complainant held appointments under what was known as a "special services agreement" from 16 April to 14 June 1974, from 15 June to 14 August 1974, from 15 August to 31 December 1974, from 1 January to 28 February 1975 and from 1 March to 31 May 1975. He held short-term appointments from 1 June to 30 November 1975 and from 1 December 1975 to 31 May 1976. He was granted fixed-term appointments from 1 June 1976 until 31 December 1979. Since 1 January 1980 he has been on a continuing appointment. He has never had non-local status.

5. According to the rule stated in Judgments 505 and 506 and set out in 2 above only staff members who had held short-term appointments in the General Service category before the end of October 1974 and had or might have been informed of their eligibility for non-local status continued to qualify for that status, providing they fulfilled the conditions determined by practice. From 16 April 1974 to 31 May 1975 the complainant held appointments under a special services agreement. He therefore did not have a short-term appointment at the material time and is not directly covered by the rule.

6. The complainant argues that his appointments under a special services agreement were in breach of the rules, that he should have been granted a short-term or fixed-term appointment instead, and that he is therefore entitled to benefit under the rule as it applies to short-term staff.

In fact it is beside the point whether it was in keeping with the rules to grant him appointments under a special services agreement. As from 1 June 1975 they were succeeded by short-term appointments, then by fixed-term ones and lastly by a continuing one. They ended long ago, were not challenged while in force, and are beyond challenge now.

The Tribunal would rule otherwise only if they had been tainted with a flaw so serious and flagrant as to make them inoperative or void. But they were not.

Besides, there is no inconsistency in entertaining a complaint which challenges the appointment as from 1 January 1980 yet declining to rule on the correctness of the appointments under a special services agreement. Unlike the earlier appointments, the decision which came into force as from 1 January 1980 is still of legal effect.

7. The point at issue is this. Even though he held appointments under the special services agreements, had the complainant been informed or might he have been of his eligibility for non-local status, or, in other words, did he stand to benefit from the expectations short-term staff members had or might have been given? If the answer were yes, he would be entitled under the principle of good faith to the fulfilment of his expectation.

Although the complainant did perhaps have an expectation of obtaining a fixed-term appointment after twelve months' continuous service, he has failed to show that he would or might have been informed of his eligibility for non-local status. The mere fact that he talked about non-local status to the chairwoman of the Non-Local Staff Association fails to establish that he had any real expectation of obtaining it.

8. The Tribunal concludes that, though receivable, the complaint is devoid of merit.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 19 June 1985.

(Signed)

André Grisel

Jacques Ducoux

H. Gros Espiell

A.B. Gardner

1. Manual provision 319.1.11 reads: "The holder of a special services agreement is referred to as a 'subscriber'. A subscriber is in no way considered to be a member of the Organization".

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