

111th Session

Judgment No. 3021

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. C. against the Food and Agriculture Organization of the United Nations (FAO) on 9 June 2009 and corrected on 14 July, the FAO's reply of 26 October 2009, the complainant's rejoinder of 9 February 2010 and the Organization's surrejoinder of 24 May 2010;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, an Italian national born in 1952, joined the FAO in June 1977 as a Guard. He was promoted several times, attaining grade G-4 on 1 July 2004 as Assistant Security Supervisor within the Security Service.

On the premises of the FAO in Rome there is a duty-free shop known as the Commissary. Access to it is restricted to authorised staff holding a Commissary card. On 22 October 2007 the Director of the Administrative Services Division (AFS) notified the complainant that

he had been informed that the complainant had entered the salesroom of the Commissary on 20 October with a friend of his who had no right of access, despite being warned not to do so by the guard. Consequently, he had decided to suspend his Commissary privileges pending receipt of his comments on the matter. The complainant, who was then on sick leave, replied on 23 October that he had gone there to do his own shopping and that he had left his friend outside the salesroom. On noticing that his friend had entered the salesroom he had immediately accompanied her outside. He added that the guard on duty had allowed his friend to enter as he had mistaken her for his wife.

By an e-mail of 29 October the Director of AFS informed the complainant that the decision to suspend his Commissary privileges was confirmed on the grounds that he had given false testimony concerning the events of 20 October. According to the Director, the video footage from surveillance cameras in the Commissary showed, without any possible ambiguity, that he had exerted pressure on the guard to let his friend into the salesroom and that he had shopped with her for almost an hour. The Director added that the complainant could view the videotapes if he wished, and that he had decided to copy his e-mail to the Human Resources Management Division (AFH) “to handle the disciplinary aspects” of the case. The complainant replied on 7 November, denying that he had breached any rules and seeking clarification as to which procedure was being followed with regard to his alleged inappropriate behaviour. That same day the Director of AFS explained to him that the suspension of his Commissary privileges was an administrative measure and not a disciplinary one.

After having viewed the videotapes the complainant wrote to the Director of AFS on 21 November 2007 asking him to withdraw the charges against him and the sanction imposed on him and to remove from his personal file all materials relating to the incident. He asserted that contrary to the charges the video showed that he had “no contact whatsoever” with the guard on duty and that his friend was sitting on a chair in the corridor and not in the salesroom. Only his wife could be seen shopping, and it was thus impossible to allege that he had been shopping for almost an hour with his friend. However, on that

same day the Director again confirmed the decision to suspend his Commissary privileges, reiterating that the video showed that he had lied concerning the events of 20 October.

The complainant resumed work on 14 January 2008. He submitted an appeal to the Director-General on 27 January contesting the decision to suspend his Commissary privileges. His appeal having been rejected as unfounded, he lodged an appeal with the Appeals Committee on 10 April requesting that the decision in question be quashed. In his subsequent submissions he also requested material and moral damages. That same day he viewed the video footage for a second time. In a memorandum of 15 April 2008 to the Director of AFH, he contended that the video shown to him on 10 April was different from that shown on 15 November 2007.

On 12 June 2008 the complainant was informed that the Organization proposed to impose on him the disciplinary measure of suspension without pay for two months in connection with the events of 20 October 2007. After his comments had been obtained, the disciplinary measure was confirmed on 17 October 2008. In January 2009 the complainant lodged a second appeal challenging that decision. That appeal was still pending when he filed his complaint with the Tribunal.

In the meantime, on 18 December 2008, the Appeals Committee issued its report on his first appeal. It concluded that the sanction of withdrawal of the complainant's Commissary privileges had been appropriate, but recommended that his privileges be restored given that 12 months had elapsed since the administrative sanction had taken effect. By a letter of 5 March 2009 the Director-General informed the complainant that he had decided to endorse the Committee's recommendation. That is the impugned decision.

B. The complainant alleges breach of due process insofar as the decision to suspend his Commissary privileges was taken without prior notice and he was not given the possibility to defend himself. In his view, the circumstances of the case did not justify that a measure be taken in urgency: the entry of his friend into the salesroom did

not occur in a deceitful way and did not prejudice the FAO. He emphasises that he had been working for the FAO for 30 years in a satisfactory manner.

He points out that neither the initial decision to suspend his privileges nor the confirmatory decision of 21 November specified the duration of the suspension, which in his view constitutes a breach of paragraph 7.3 of Annex D to Manual Section 103. He contends that he was led to believe that his Commissary privileges had been suspended forever. He states that his health condition deteriorated following the notification of the suspension measure and that his reputation was impaired.

The complainant also alleges misuse of authority, arguing that the suspension measure constituted a hidden disciplinary sanction. He explains that the rationale behind Annex D to Manual Section 103, which restricts access to the Commissary, is to prevent abuse of tax privileges. Since his friend did not purchase any goods and did not enter the Commissary with his card, no such abuse occurred in this case. He adds that although access to the premises is restricted, visitors, such as his friend, can be allowed in only with the authorisation of the security staff. Thus, he cannot be held responsible for the fact that his friend entered the Commissary salesroom since he did nothing to hide her from the security staff on duty that day. Neither can he be held responsible for not having taken his friend out of the salesroom, since he had not even noticed her entering. He asserts that he received no warning from the guard on duty when he entered the Commissary.

In the complainant's view, the decision to withdraw his Commissary privileges for more than a year was disproportionate, given the standard practice of suspending staff members' Commissary privileges for only two months if they have lent their card to an unauthorised person. He objects to the fact that it took the FAO more than five months to give him back his Commissary card after the impugned decision was taken. Lastly, he alleges violation of the principle against double jeopardy, as he was also suspended without pay for two months on the basis of the same facts.

The complainant asks the Tribunal to quash the impugned decision, to order that the measure of suspension of his Commissary privileges be removed from his personal file and to order the FAO to publish the Tribunal's judgment in the Organization's Newsletter. He seeks 4,000 euros in material damages, as he was unable to benefit from his Commissary privileges for 17 months, as well as additional material damages for the damage caused to his health. He also seeks moral damages as well as costs for the internal appeal proceedings and for the proceedings before the Tribunal.

C. In its reply the FAO denies any breach of due process, explaining that the decision of 22 October 2007 was an interim, precautionary measure, which was to last until the complainant had provided explanations. His right to be heard was not infringed since he was given the opportunity to comment on that decision. It adds that the interim measure was adopted on the basis of elements available at the time and that the main fact – i.e. that one of the complainant's friends was present in the salesroom without authorisation – was established from the beginning. It contends that adversarial hearings are not required for an administrative measure to be valid. All that is required is that the staff member concerned be given the opportunity to give his opinion, which the complainant was able to do.

The Organization denies any misuse of authority and asserts that the decision to suspend the complainant's Commissary privileges was not a hidden disciplinary sanction but an administrative decision aimed at ensuring that the Commissary's rules and the commitments made by the FAO to the host country are respected. The precautionary character of the decision taken on 22 October 2007 justified its immediate implementation. It adds that the Director-General indicated in the impugned decision that he did not share the Appeals Committee's view that the decision to withdraw the complainant's Commissary privileges was a sanction. The decision was taken on the basis of Annex D to Manual Section 103, which provides, *inter alia*, that Commissary privileges may be withdrawn from a staff member who is deemed to have misused his privileges or who has behaved in a disruptive manner in the salesrooms or *vis-à-vis* the Commissary staff. It stresses that

both the decision of 22 October and that of 29 October 2007 indicated that the measure was taken because the complainant had contravened the applicable rules. The FAO considers that the mere presence of the complainant's friend gives rise to a strong presumption that she could have "influenced" the purchases made by the complainant, in breach of paragraph 1.5 of Annex D to Manual Section 103, according to which all goods purchased from the Commissary are for the personal use of the entitled person and his or her immediate family and are not for gift or sale. It submits that the complainant, in his capacity as a member of the security staff, was well aware of the rules governing access to the salesroom and did not need to be warned that his actions were or could be in violation of the applicable rules. It adds that all the guards present at the time of the incident on 20 October 2007 held lower grades than him.

The FAO considers that the decision to withdraw the complainant's Commissary privileges for an extended period of time was proportionate, as he should have had a higher sense of responsibility in matters of security because of his function and experience. It asserts that it did not act in breach of the principle against double jeopardy, given that the complainant was not subjected to two disciplinary measures.

D. In his rejoinder the complainant presses his pleas. He draws attention to the fact that the decision of 22 October 2007 did not indicate that the suspension of his Commissary privileges was an interim measure.

E. In its surrejoinder the Organization maintains its position. It submits that the complainant has failed to exhaust internal remedies with regard to his claims for damages, for removal of the measure to suspend his privileges from his personal file and for publication of the Tribunal's judgment in the Organization's Newsletter; they are consequently irreceivable.

CONSIDERATIONS

1. The complainant impugns the decision of the Director-General dated 5 March 2009, insofar as the Director-General rejected his appeal in which he sought the quashing of the decision to suspend his Commissary privileges and also moral and material damages. The Appeals Committee found that:

“not only did the [complainant] bring his friend onto FAO premises during off-hours, but he also allowed her to remain within the entrance area of the Commissary salesroom, thereby providing the opportunity for her eventual entry into the salesroom; neither was remedial action taken to ensure her immediate exit once her presence in the salesroom was discovered. [...] Furthermore, the seriousness in the failure to prevent an unauthorized person, the [complainant’s] friend, from entering the FAO Commissary salesroom is aggravated by the fact that the [complainant] was an Assistant Security Supervisor. The [complainant], a long serving staff member and holding the position of Assistant Security Supervisor, should have had a higher sense of responsibility in matters of security and unauthorized entry.”

The Director-General endorsed that conclusion and decided to confirm the suspension of the complainant’s Commissary privileges for a period of 12 months. He agreed that the complainant “was responsible for the abuse of his Commissary privileges” on 20 October 2007.

2. In its reply the FAO argues that the decision to withdraw the complainant’s Commissary privileges is justified under the provisions of Annex D to Manual Section 103. Paragraph 1.4 of that Annex relevantly provides that:

“The Director-General shall [...] take every precaution to ensure that no abuse of a [Commissary] privilege [...] shall occur. Any action on the part of a Commissary user or a respective family member [...] may be subject to disciplinary action in accordance with Manual Section 330 further to a report by the Commissary Manager to the Director, AFS.”

Article 7 of Annex D, which is headed “ABUSE”, relevantly provides:

“7.1 All persons granted Commissary privileges are personally responsible for ensuring that purchases on their account do not exceed ‘reasonable quantities’ as defined in para 4.5 above [...].

- 7.2 Any purchases that are considered to be excessive will be brought to the attention of the Director, AFS. Any staff member with excessive purchases of any single items may then receive a memorandum from the Commissary Manager reminding them of the provisions laid out in the Manual Section. Abuse of Commissary privileges may entail reduction of entitlements, or temporary or permanent withdrawal of entitlements.
- 7.3 The Director, AFS, may withdraw Commissary privileges from a staff member or other Commissary user, who has purchased excessive quantities of goods, who has been deemed to have misused his/her Commissary privileges or who has behaved in a disruptive manner in the salesrooms or vis-à-vis the Commissary staff. Withdrawal of the card will be for a period of time deemed to be commensurate with the abuse or inappropriate behaviour. The Director, AFS informs the Director, Human Resources Management Division (AFH) regarding FAO staff.
- 7.4 In the event of serious abuse, the Director AFS consults with the Director, AFH to determine appropriate disciplinary action under the provisions of Manual Section 330.”

3. The primary question that arises in the present case is whether the acts and/or omissions of the complainant on 20 October 2007 fall within the scope of paragraph 7.3 of Annex D. The relevant acts and/or omissions fall within a short compass, and are identified in the Organization’s reply as the complainant’s failure to take reasonable action to prevent an unauthorised person, a friend of his, from entering the FAO Commissary, and his failure to take reasonable action to stop his friend’s unauthorised presence once he became aware of it. In this regard, it may be noted that paragraph 2.5 of Annex D provides that “guards will not permit access to the Commissary premises to persons who do not display a valid Building Pass/Commissary Card”. Accordingly, what is asserted by the Organization is the breach of a positive duty on the part of the complainant to ensure his friend’s compliance with Commissary rules. It may well be that, by virtue of his position at the time, namely, Assistant Security Supervisor, there was such a duty. However, the question raised by this complaint is not whether the complainant had

such a duty by virtue of the position he occupied within the FAO, but whether the failures identified by the Organization fall within the terms of paragraph 7.3 of Annex D.

4. Paragraph 7.3 of Annex D specifies only three circumstances in which Commissary privileges may be withdrawn, namely, where the person concerned:

- has purchased excessive quantities of goods, [...]
- has been deemed to have misused his/her Commissary privileges or [...]
- has behaved in a disruptive manner in the salesrooms or vis-à-vis the Commissary staff.”

After specifying these circumstances, paragraph 7.3 proceeds to describe them as “abuse or inappropriate behaviour”, thus indicating that “abuse” is constituted by the purchase of excessive quantities of goods or misuse of Commissary privileges and that “inappropriate behaviour” is constituted by disruptive behaviour in the salesrooms or vis-à-vis Commissary staff. Paragraph 4.5 defines “reasonable quantities” to mean “the purchases which fall within normal purchasing trends of the average customer”. “Misuse” is not defined, but its general meaning can be ascertained from other provisions of Annex D, including paragraph 1.2, which indicates that purchases must be “for personal use and consumption and not for gift or sale”, paragraph 2.4, which relevantly provides that a Commissary card “is not transferable”, and paragraph 2.5, which provides that a card is for “personal use only”. Within this context, it is clear that “misuse [of] Commissary privileges” extends to purchasing goods for gift or sale, purchasing goods for another person or allowing another person to use the card to enter Commissary premises or to purchase goods. However, it is neither claimed that the complainant did any of these things nor that he purchased excessive quantities of goods, but only that he failed to prevent the entry and continued presence of his friend in the Commissary. Those omissions do not fall within the ordinary meaning of the words “abuse” or “misuse” of Commissary privileges,

or such other meaning as may be ascertained from the terms of Annex D. And as it has not been suggested that the complainant behaved in a disruptive manner, those omissions do not otherwise fall within the terms of paragraph 7.3. It follows that the impugned decision must be set aside.

5. Although the impugned decision must be set aside, it does not follow that the initial withdrawal of the complainant's Commissary privileges was unlawful. As already noted, the Director-General has a duty to take precautions to prevent abuse of Commissary privileges. The presence of the complainant's friend, first, at the entrance to the Commissary and, later, within the Commissary, was highly irregular. Moreover, the evidence as to her actions within the Commissary salesroom was such as to give rise to a reasonable suspicion that the complainant had abused his Commissary privileges. Given the duty cast on the Director-General to prevent abuse of privileges, it was open to the FAO to suspend the complainant's Commissary privileges, as an interim measure, for a reasonable period while it investigated the events in question. In this regard, it may be noted that the nature of a privilege is such that it may be suspended or withdrawn as an interim measure to prevent abuse even if there is no specific provision to that effect in the relevant rules. In the present case, the investigation should have taken no more than one month. Accordingly, the withdrawal of the complainant's privileges, even as an interim measure, cannot be justified beyond 20 November 2007.

6. The Director-General's decision of 5 March 2009 must be set aside on the basis that it is not supported by paragraph 7.3 of Annex D. Save for two matters which are relevant to moral damages, this renders it unnecessary to consider other arguments advanced by the complainant. The first matter concerns what is claimed to be "breach of due process". Save where disciplinary proceedings are initiated pursuant to paragraph 7.4 of Annex D, decisions under

paragraph 7.3 are administrative in nature. As such, they are not subject to the requirements of “due process”. However, a person in respect of whom a decision is made under paragraph 7.3 is entitled to procedural fairness. That is not to say that that person must be given an opportunity to answer the case against him or her before an interim decision is taken. However, he or she must be given that opportunity before a final decision is made to withdraw his or her Commissary privileges. In the present case, it would seem that a final decision to confirm the interim suspension of the complainant’s Commissary privileges was made on 29 October 2007, without the complainant having then been given an opportunity to view the videotapes on which that decision was based. That was a denial of procedural fairness and will be taken into account in the award of moral damages. The second matter to be taken into account is the failure to specify the duration of the withdrawal of Commissary privileges in the decision of 29 October 2007. Paragraph 7.3 of Annex D clearly postulates that suspension will be for a definite period, such period being “commensurate with the abuse or inappropriate behaviour”. No period was in fact specified until 5 March 2009, well after the period of withdrawal recommended by the Appeals Committee had expired. This failure will also be taken into account in the award of moral damages.

7. Two further matters should be noted. The first is that the complainant claims material damages in consequence of what he claims was further damage to health occasioned by the decision to withdraw his Commissary privileges. There is evidence that the complainant’s medical condition worsened soon after he was informed on 22 October of the interim decision to suspend his privileges. However, and as indicated above, that interim decision was justified. Accordingly, there is no basis for the award of material damages with respect to the claimed damage to his health. The second is that the complainant has applied for an oral hearing so that he may call witnesses. As the outcome of this matter turns on the wording of

paragraph 7.3 of Annex D, an oral hearing is unnecessary. Therefore, this application is rejected.

8. The complainant is entitled to material damages for the unlawful decision to withdraw his Commissary privileges in the amount of 4,000 euros as requested by him. He is also entitled to moral damages for that decision and for the matters referred to in consideration 6 above in the sum of 8,000 euros, as well as costs in the sum of 3,000 euros for these and the internal appeal proceedings.

DECISION

For the above reasons,

1. The Director-General's decision of 5 March 2009 is set aside.
2. The FAO shall pay the complainant material damages in the sum of 4,000 euros.
3. It shall pay him moral damages in the sum of 8,000 euros.
4. The FAO shall also pay the complainant costs in the sum of 3,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 20 May 2011, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet