

**115th Session**

**Judgment No. 3200**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms A. A. against the Food and Agriculture Organization of the United Nations (FAO) on 25 February 2011, the FAO's reply of 10 June, corrected on 23 June, the complainant's rejoinder of 15 July and the Organization's surrejoinder of 27 October 2011;

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. The complainant, an Eritrean national born in 1958, joined the World Food Programme (WFP) – an autonomous joint subsidiary programme of the United Nations and the FAO – in 1989 under a fixed-term appointment at grade G-2 in Rome, Italy. Following several promotions, in 2003 she reached grade P-3 and in 2004 she was reassigned to the WFP's Country Office for Somalia as a Finance Officer at the same grade.

In February 2007 Ms A., a former staff member, lodged a harassment complaint with the Office of Inspections and Investigations (OSDI), alleging that the complainant, who had supervised her during her employment with the WFP, had harassed and intimidated her and that the situation had culminated in the termination of her appointment prior to its expiry. Having conducted an investigation, on 14 May 2008 OSDI submitted a report to the Director of the Human Resources Division, in which it found that the complainant had harassed Ms A. and other staff members and that, by taking steps to have Ms A.'s contract terminated, the complainant had abused her authority. It recommended that administrative or disciplinary action be taken against her because her actions had violated the WFP's Policy on the Prevention of Harassment.

By a memorandum dated 25 August 2008, to which a copy of the OSDI report was appended, the Director of the Human Resources Division informed the complainant that she was being charged with misconduct. She was asked to provide a written response to the findings and conclusions in the report and to the charges set out in the memorandum. The Director explained that, following receipt of her reply, a decision would be taken as to what disciplinary measure, if any, would be imposed on her.

In a detailed reply of 22 September the complainant denied the charges and asserted that both OSDI's investigation and its report were flawed. By a memorandum of 26 January 2009 the Director of the Human Resources Division informed her that, following a review of her comments and of the available evidence, the Administration had decided to impose on her the disciplinary measure of demotion to grade P-2, with no possibility of promotion for at least one year. The complainant was subsequently demoted from grade P-3 to grade P-2 with effect from 1 March 2009.

On 23 April 2009 the complainant lodged an appeal with the Executive Director of the WFP challenging the demotion decision. She asserted inter alia that she had been falsely accused, denied due process, and that the sanction imposed was disproportionate. She pointed to delays in the internal procedure and stated that her career

had been “frozen” for two years as a result. She requested a reversal of the decision, damages for loss of opportunity, and legal costs. By a letter of 16 June the Executive Director notified the complainant that her requests were rejected, as she was satisfied that the decision was appropriate and proportional, and taken in accordance with the applicable statutory requirements. On 25 August 2009 the complainant filed an appeal with the Appeals Committee of the FAO. During the course of the internal appeal proceedings she reiterated her earlier assertions and alleged conflict of interest on the part of the Chief of OSDI, Mr A., who had signed the OSDI report but who also acted as her second-level supervisor. He had both notified her of the demotion decision and then been responsible for its implementation in his function as Deputy Regional Director after he was transferred to the Sudan Country Office. The complainant maintained her claims for relief and requested additional damages for psychological and emotional harm due to delay in the internal procedure and for breach of confidentiality during the OSDI investigation.

In its report dated 17 March 2010 the Appeals Committee concluded that the delays in handling the matter were difficult to justify and that they had had personal and professional consequences for the complainant. Furthermore, the OSDI investigation was procedurally flawed and tainted with bias. The Committee found that it could not formally address the plea of conflict of interest because it had not been raised by the complainant in her statement of appeal of 25 August 2009, but it nevertheless considered that the dual role played by Mr A. constituted a conflict of interest. It recommended reversal of the demotion decision with retroactive effect from 1 March 2009, payment to the complainant of the resulting difference in the salary and allowances due to her and removal of the harassment complaint and related documents from her personnel file. It rejected her remaining claims.

By a letter of 15 December 2010 from the Director-General of the FAO the complainant was informed that, after a careful review of the case, he considered that the findings and recommendations of the Appeals Committee with regard to procedural issues and the OSDI

investigation were not justified. Furthermore, the Committee, in examining the conduct of the investigation, had committed an error by considering and making recommendations with regard to issues that she had not raised during the appeal. As a result, he had decided not to accept the Committee's recommendations to reverse the disciplinary sanction of demotion and to remove the relevant documentation from her personnel file. Her appeal was rejected as unfounded on the merits and her claims for compensation were also rejected. That is the impugned decision.

B. The complainant submits that, as her plea with respect to conflict of interest was raised in a timely manner during the internal appeal proceedings and the Organization had the opportunity to reply to it, it is therefore receivable. In addition, all of the findings of the Appeals Committee regarding procedural flaws in the OSDI investigation are properly before the Tribunal, as are her related claims for damages.

On the merits, she continues to deny the charges of harassment and abuse of authority and she refers to her submissions in her appeal to the Executive Director of the WFP in this respect. She contends that OSDI violated paragraph 5.2 of its own Quality Assurance Manual, which sets out the procedures to be followed during an investigation. In particular, the investigators failed to inform her of the accusations against her and the identity of her accuser before interviewing her, they did not inform her of her right to nominate witnesses, and their questioning of the various witnesses they did interview was one-sided. They did not evaluate the potential biases of witnesses and she was not given the opportunity to challenge individuals who had provided evidence against her. In addition, it was more than one year after her interview – after her receipt of the OSDI report – that she was eventually permitted to submit the names of other potential witnesses, none of whom was interviewed.

The complainant contends that there was an inordinate delay on the part of the Administration in dealing with the harassment allegation which prejudiced her ability to present a defence. Ms A. filed her complaint in February 2007, but OSDI took five months to

begin its investigation and a further ten months to submit its report. Furthermore, she received notice of the proposed disciplinary action by a letter dated 25 August 2008, confirmation of her demotion in a letter dated 26 January 2009, was demoted with effect from 1 March, and was only assigned to a different post at grade P-2 as from August 2009. She states that during this period of time she lost two opportunities to be transferred to other grade P-4 posts, a 2007 recommendation for her promotion to grade P-4 was not approved, and a proposal for promotion in 2009 was abandoned. As a consequence, she suffered anxiety and harm to her career. Referring to the Tribunal's case law, the complainant asserts that there was also inordinate delay in the internal appeal process, in particular because a period of almost seven months elapsed between the Appeals Committee's report to the Director-General and the latter's decision on her case. She characterises the period of time required by the Administration to complete the investigation and appeals procedures as "inexcusable".

She points out that, as a consequence of her demotion, she was not eligible for promotion until 1 March 2010, at which time she was promoted to grade P-3 with retroactive effect from 1 January of that year. She argues that, given the aforementioned lost opportunities for promotion caused by the Administration's delay in dealing with her case, in the event that the Tribunal reverses the demotion decision, she is entitled to promotion to grade P-4 as from 1 January 2010.

With respect to her pleas related to conflict of interest, the complainant maintains that both she and Mr A. were placed in an awkward situation following her demotion because he was responsible for delivering and implementing the decision, and his immediate solution was to reduce the amount of work she was assigned. Indeed, it took him almost six months to place her in another P-3 post at grade P-2. She points to the findings of the Appeals Committee in this respect.

The complainant asks the Tribunal to quash the impugned decision and to order the FAO to reverse the demotion decision and pay her the resulting difference in the salary and allowances due to

her at grade P-3. She seeks a promotion to grade P-4 with effect from 1 January 2010, and payment of the difference in salary and allowances due to her at that grade as from that date. She claims 50,000 euros in moral damages for the delay in the internal investigation and appeals procedures, and 10,000 euros in costs for the present proceedings and the internal appeal proceedings.

C. In its reply the FAO contends that the complainant's claims regarding conflict of interest, the Appeals Committee's findings with respect to specific procedural flaws in the OSDI investigation and her request to be promoted to grade P-4 with effect from 1 January 2010 are all irreceivable for failure to exhaust the internal means of redress.

On the merits, the Organization submits that the imposition of the disciplinary sanction of demotion was lawful. The decision was based on a careful review of the evidence, including that provided by the complainant, and it was correctly concluded that her actions constituted harassment and were a violation of the WFP's Policy on the Prevention of Harassment, FAO Staff Regulation 301.1.1 and the Standards of Conduct for the International Civil Service.

The FAO asserts that the complainant's due process rights were respected. During the investigation, she was informed of the allegations against her and the identity of her accuser. She was invited to name witnesses during both the investigation and the disciplinary proceedings but she failed to do so and her allegations regarding bias and lack of credibility on the part of witnesses who were interviewed are unsubstantiated. Also, she was able to confront and test the evidence against her during her interview and she was subsequently provided with a record of that interview and given the opportunity to make comments and corrections. Regarding the complainant's allegations concerning the conduct of the investigation, the defendant asserts that, contrary to the finding of the Appeals Committee, she was presumed innocent and the questions of the investigators were appropriate and unbiased. Referring to Judgment 2771, the

Organization points out that the Tribunal has previously held that the investigative process provided for in the OSDI Quality Assurance Manual is valid and, according to the standards clarified in that judgment, the complainant was clearly afforded due process.

The FAO contends that the investigation, disciplinary process and internal appeal proceedings were completed within a reasonable time. The applicable rules do not stipulate a time frame within which cases such as the complainant's must be dealt with and it therefore had a duty, which it fulfilled, to investigate the claim of harassment promptly and thoroughly and to conclude the disciplinary proceedings in a timely manner.

The Organization denies the complainant's allegations of conflict of interest. It states that Mr A. signed the OSDI report in his capacity as Chief of OSDI. He was then transferred to the WFP's Sudan Office as Deputy Regional Director, at which point he became her second-level supervisor. It was in this capacity that he notified her of the disciplinary sanction imposed on her, but he did not take the decision, nor was he involved in the decision-making process. Furthermore, Mr A. was not responsible for the decision to transfer the complainant to a P-3 post at grade P-2.

D. In her rejoinder the complainant reiterates her submissions as to the merits of her complaint. She asserts that her pleas related to conflict of interest and the Appeals Committee's findings related to the conduct of the investigation are receivable. Furthermore, her request for a promotion to grade P-4 is not a "new claim" as argued by the defendant, but rather a request for a remedy which is similar to a request for inclusion of annual increments in the event that a complainant's salary and allowances are restored by order of the Tribunal. In addition, referring to the case law, she asks the Tribunal to find that the charges against her have not been proven beyond a reasonable doubt.

E. In its surrejoinder the FAO maintains its position.

## CONSIDERATIONS

1. The complainant was demoted from grade P-3 to grade P-2 on the grounds that she had harassed and intimidated Ms A., a staff member over whom she had authority. The decision was taken by the WFP following an investigation report on the facts of the case. She lodged an appeal against that decision with the FAO Appeals Committee on 25 August 2009. In its report of 17 May 2010, the Committee concluded that it had difficulty in justifying the delays in handling the case, that the investigative procedures were flawed, and that the investigation was not without bias. In addition, it stated that it was unable to consider the issue of conflict of interest because the complainant had not raised it in her appeal. The Committee recommended that the disciplinary sanction of demotion be reversed with retroactive effect to 1 March 2009, and that the complainant be paid the difference in all relevant salaries and allowances due to her as a result of the reversal. It further recommended that the harassment complaint by Ms A. and all relevant documentation be removed from the complainant's personnel file, and it rejected her remaining claims.

It also recommended that the Organization pay particular attention in the future to avoid "similar situations where investigators subsequently become line managers, thus creating conflicts of interest", that "OSDI investigators include a written confirmation in the Report of Investigation that the staff member under investigation has been advised verbally (and/or in writing) of his/her right to suggest names of witnesses, so as to eliminate any possibility of doubt that correct procedures have been followed in this respect" and that the WFP "consider changing the format of its response to Appellants" to follow more closely the format used by the FAO in which "the Director-General writes an exhaustive letter to the appellant in reply to his/her appeal".

2. By a letter of 15 December 2010 the complainant was informed that the Director-General had decided to reject her appeal as unfounded on the merits as well as her claims for compensation. The complainant impugns this decision on several grounds. First, she

alleges that the delays in handling her case were not justified. Second, the investigative procedures of OSDI were flawed and she was denied due process. Third, the investigation was biased. Fourth, there was a conflict of interest in that the former head of OSDI, following his transfer, became her second-level supervisor and, as such, was responsible for informing her of her demotion, and later for carrying out the demotion by reassigning her to a lower post.

3. The complainant's claims before the Tribunal are set out under B, above.

4. The complainant submits that there was an excessive delay in dealing with the whole matter and in particular with her internal appeal. She argues that these inexcusable delays caused her anxiety and harmed her career, for which she seeks compensation.

5. The Tribunal observes that the complaint from Ms A., accusing the complainant of harassment and intimidation, was filed with OSDI on 11 February 2007. OSDI conducted interviews in July 2007. It submitted its report to the Director of Human Resources on 14 May 2008. In the report, OSDI concluded that voluminous testimonial evidence showed that the complainant had harassed Ms A. and other staff members and created a hostile work environment, and that the complainant had abused her authority when she took steps to have Ms A.'s contract terminated in retaliation for her having engaged the available staff mechanisms to resolve concerns about the treatment she received from the complainant. It recommended that administrative or disciplinary action be taken against the complainant for her violation of the WFP Policy on the Prevention of Harassment. The complainant received notice – dated 25 August 2008 – of the proposed disciplinary action, to which she replied within the month. She later received a detailed, ten-page memorandum from the Director of the Human Resources Division, dated 26 January 2009, with the subject heading “Final Imposition of [the] Disciplinary Measure of Demotion in connection with [the] Allegations of Misconduct”, informing her that the charges had been confirmed and that the

proposed disciplinary demotion to grade P-2 with no possibility of promotion for at least one year would be imposed. She was demoted from P-3 to P-2 with effect from 1 March 2009. The complainant challenged that decision on 23 April 2009 and the Executive Director of the WFP denied her requests on 16 June 2009. She then submitted an appeal to the FAO Appeals Committee on 25 August 2009. The Committee sent its report to the Director-General on 17 May 2010 and the Director-General rejected the appeal by letter dated 15 December 2010.

6. Although the case was complex and detailed, and the subject matter sensitive, the time taken to complete the proceedings was indeed excessive. The Tribunal notes in particular that it took OSDI ten months to bring the investigation to a conclusion following the interviews, and it took the Director-General seven months to reject the appeal after receiving the Appeals Committee Report. The total length of the proceedings cannot therefore be considered reasonable, and specifically, the two intervals of time noted above were excessive. The conclusion is that the Organization did not respect the need for expeditious proceedings and violated its duty of care towards the complainant.

7. The complainant asserts that OSDI's investigative procedures were flawed in numerous ways. She contends that the investigators did not inform her of the accusation or the identity of her accuser before interviewing her, in violation of paragraph 5.2 of OSDI's Quality Assurance Manual. Furthermore, the investigators did not inform her of her right to name witnesses; the investigators' questioning of witnesses appeared one-sided; and the investigation appeared biased.

There is an issue as to whether the complainant was informed at the investigation stage of the accusations and the identity of her accuser or accusers. The complainant contends that she was not told either. The FAO submits that she was told of the accusations and, indirectly, of the identity of her accusers. It relies on the OSDI report

which states “[o]n 23 July 2007, OSDI informed [the complainant] of the allegations that had been made against her and conducted an interview”. This can be contrasted with an earlier statement in the OSDI report under the heading “METHODOLOGY” that: “Based on the foregoing [the written complaint, interviews with 24 staff members and the review of documents] OSDI notified [the complainant] that allegations had been raised against her and conducted interviews with her in [that] regard.”

8. Paragraph 5.2 of the OSDI Quality Assurance Manual reads as follows:

“An investigation must follow due process to ensure a basic level of fairness, transparency, and consistency. Due process in the context of an investigation means that the subject of any allegations should be informed of these allegations by the investigator(s) prior to being interviewed. The time and manner of such disclosure should be made keeping in mind fairness to the subject and the need to protect the integrity of the investigation and the interests and rules of the Programme. During the interview the subject must be given the opportunity to respond to these allegations and should be invited to name witnesses and indicate evidence to support his or her version of events.”

Accordingly, it is required that the subject of the allegations should be informed of the allegations prior to being interviewed. Paragraph 5.2 allows the investigators some latitude as to when this occurs. This is understandable. As this provision makes clear, the timing of this notification will be influenced by, amongst other things, fairness to the subject and the need to protect the integrity of the investigation. It contemplates that, at the interview, the accused will be invited to name witnesses and indicate evidence to support the accused’s version of events. It will often be fair to the accused to give notice of the allegations some time before the interview, perhaps even days, so that the accused has an opportunity to gather their thoughts about who might give evidence on the accused’s behalf and, in appropriate cases, identify documents which might assist the accused’s defence. Of course, as paragraph 5.2 also contemplates, such notice might be inappropriate if it compromised the integrity of the investigation, but that is likely not to be the norm. However, what

is clear is that this step of informing the accused of the allegations should occur before the interview.

9. In the present case, the evidence does not support a finding that the complainant was told, either at the outset of the interview or before, what the accusations were. Having regard to the written record of the interview it is highly improbable that she was told. The written record of the interview contains, at the beginning, a paragraph commencing “The investigators began the interview by [...]” and the record details what was said to the complainant by the investigators at that point in the interview. No reference is made to the fundamentally important step of informing the complainant of what the allegations against her were. It is highly likely that this fundamental step would have been referred to if it occurred. Moreover, the fact that the written record indicates, immediately after this paragraph, that the complainant asked “who was accusing [her]” (a matter discussed in more detail shortly) is neutral on the factual issue of whether the allegations were disclosed.

When the complainant asked towards the beginning of the interview who was accusing her she was told, in effect, that this information would emerge from the questions. This is not what paragraph 5.2 requires. In order to understand what the allegations are and how to respond and frame a defence, an accused would need to be told who had made the allegations. The identity of the accuser is a significant piece of information necessary to inform the accused of the factual context in which the accused’s alleged conduct was said to have occurred. The obligation to inform the accused of the allegations includes an obligation to identify the accuser as part of the factual matrix of what constitutes “the allegation”.

10. In Judgment 2771, under 15, the Tribunal discussed the content of due process rights in the context of an investigation. It reads as follows:

“The general requirement with respect to due process in relation to an investigation – that being the function performed by the Investigation Panel in this case – is as set out in Judgment 2475, namely, that the

‘investigation be conducted in a manner designed to ascertain all relevant facts without compromising the good name of the employee and that the employee be given an opportunity to test the evidence put against him or her and to answer the charge made’. At least that is so where no procedure is prescribed. Where, as here, there is a prescribed procedure, that procedure must be observed. Additionally, it is necessary that there be a fair investigation, in the sense described in Judgment 2475, and that there be an opportunity to answer the evidence and the charges.”

In Judgment 2475, under 7 and 20, the Tribunal observed:

“7. The relevant provisions do not provide for formal investigatory or disciplinary procedures. This notwithstanding, the obligations of an employer to act in good faith and to respect the dignity of its employees determine what is permissible. In particular, these considerations require that an investigation be conducted in a manner designed to ascertain all relevant facts without compromising the good name of the employee and that the employee be given an opportunity to test the evidence put against him or her and to answer the charge made.”

“20. It has been consistently held by the Tribunal that an employee of an international organisation has a right to be heard in disciplinary proceedings and, as said in Judgment 203, that ‘right includes *inter alia* the opportunity to participate in the examination of the evidence’. As that judgment makes clear, that is so even ‘in the absence of any explicit text’. See also Judgment 2014 in which it was said that ‘[i]t is contrary to due process to require an accused staff member to answer unsubstantiated allegations made by unknown persons’ and that ‘[t]he staff member is entitled to confront his or her accusers’.”

11. Paragraph 5.2 must be interpreted in a manner consistent with the fundamental right of due process to know the name of the accuser except in those circumstances where revealing the identity of the accuser could undermine the integrity of the investigation. There is no suggestion in the present complaint that that was the case.

The OSDI investigators had received a written complaint from Ms A. dated 11 February 2007 setting out specific allegations. The investigators interviewed Ms A. and other staff before interviewing the complainant on 23 July 2007. In one of those interviews, a staff member stated that the complainant had called another male staff member “retarded”, an accusation not made, it appears, by the male staff member himself in his interview. This can be used to illustrate

the vice in the investigation process. That the complainant allegedly called the staff member “retarded” was an element in OSDI’s conclusion that the complainant had harassed staff. Yet in the interview on 23 July 2007 all that appears to have been raised was whether the complainant had used the word “retarded” when referring to a staff member. No context appears to have been given. The person who claimed to have heard it and the person of whom it was said could have been identified. They were not. But that information would have provided the complainant with important details of that particular allegation. It was not furnished. The Tribunal is satisfied that the investigators did not afford the complainant due process.

12. The standard of process applicable in this matter at the investigation stage is embodied in paragraph 5.2 of the Quality Assurance Manual. It must be complied with the Tribunal’s case law; it was not, and this taints the process leading to the ultimate decision. For this reason alone, the impugned decision should be set aside. However, it is convenient to deal briefly with other elements of the complainant’s case.

13. On the question of whether the complainant was informed by the investigators of her right to name witnesses, the Tribunal is not affirmatively satisfied that, as a matter of fact, she was not informed.

14. As for the argument that the investigation was biased, it must be pointed out that the investigators have some discretion in questioning witnesses, and there is no rule requiring standardised questions. Furthermore, the questions were not recorded in the Investigation Report and it was not reasonable for the Appeals Committee to assume from the (non-verbatim) answers that the questions were leading or that the questions fell outside the range of reasonable correctness. There are indeed many ways to ask a question which could result in the same summarised answer. Without knowing the precise question, and without having a verbatim answer recorded, the assumption that a question was leading, cannot be sustained. The Tribunal notes that the complainant was informed by the Chief of the

Staff Relations Branch of the Human Resources Division by e-mails of 12 and 16 September 2008 that she had the right to submit names of witnesses. In the e-mail of 12 September, the Chief wrote, in relevant part that: “WFP Investigations procedure require that you may provide in your response, the names and contact details of any witnesses you consider should be heard on this matter, including the precise basis for why you believe their testimony would be relevant to the matter investigated”. The e-mail of 16 September, sent to the complainant and her lawyer, stated in relevant part: “[the complainant] indeed has the right to submit names of witnesses who she believes will be able to provide insight into the particular issue at hand, and who she would like the Programme to interview in connection with the specific charges”. These e-mails were sent prior to the finalisation of the proceedings and prior to the 26 January 2009 decision to demote her to grade P-2 and they gave the complainant the opportunity to introduce a precise list of witnesses and to defend herself. Therefore, the claim of bias is unsubstantiated.

15. Lastly, the complainant alleges conflict of interest on the grounds that the former head of OSDI, who had signed the report accusing her, later became her second-level supervisor and, at the time that the decision to demote her was taken, he delivered the decision to her and was later responsible for implementing it. However, the fact that he later became her supervisor could not, in the Tribunal’s view, affect the decision which was taken before. Moreover, it should be noted that her supervisor was not responsible for the decisions taken, but was merely acting as the messenger. Consequently, the plea relating to a conflict of interest must be dismissed on the merits and there is no need to consider its receivability.

16. Considering the above, the decision to demote the complainant will be set aside with effect from 1 March 2009. The FAO will be ordered to pay the complainant the difference in all relevant salaries and entitlements retroactively to 1 March 2009, together with interest at the rate of 5 per cent per annum from due dates. In addition, the Tribunal will award the complainant moral

damages in the amount of 4,000 euros for the inordinate delays in the investigation and internal appeal proceedings, as detailed under considerations 5 and 6, and for the flawed investigation process. As the complaint succeeds in substantial part, the Tribunal will award costs in the amount of 4,000 euros.

#### DECISION

For the above reasons,

1. The impugned decision of 15 December 2010 is set aside as is the earlier decision to demote the complainant with effect from 1 March 2009.
2. The FAO shall pay the complainant the difference in all relevant salaries and entitlements retroactively to 1 March 2009, together with interest at the rate of 5 per cent per annum from due dates.
3. The Organization shall pay the complainant moral damages in the amount of 4,000 euros.
4. It shall also pay her 4,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 10 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo  
Dolores M. Hansen  
Michael F. Moore  
Catherine Comtet