

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

N. (No. 2)

v.

FAO

129th Session

Judgment No. 4229

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr N. N. against the Food and Agriculture Organization of the United Nations (FAO) on 31 January 2019, corrected on 6 February, and the FAO's reply of 27 May 2019, no rejoinder having been filed within the given deadline;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant, a former staff member of the World Food Programme (WFP) – an autonomous joint subsidiary programme of the United Nations and the FAO –, challenges the decision to maintain the decision not to renew his contract, and to award him material and moral damages instead of reinstatement.

Facts relevant to this case can be found in Judgment 3879, delivered in public on 28 June 2017, in which the Tribunal set aside the complainant's 2011 Performance and Competency Enhancement (PACE) appraisal report.

In March 2013 the complainant challenged the “unsatisfactory” overall rating in his 2012 PACE appraisal report through the PACE recourse procedure. An *ad hoc* Review Group was established and recommended maintaining the unsatisfactory rating, which the Administration did by a decision of 30 April 2013.

By a memorandum of 2 May 2013 the complainant was informed that, as the “unsatisfactory” overall rating in his 2012 PACE appraisal report was upheld, WFP had decided not to renew his appointment beyond its expiry date of 3 June 2013 based on unsatisfactory service. The decision also referred to paragraph 308.4.16 of the Administrative Manual which provides that: “A staff member whose service has been reported as unsatisfactory for two successive qualifying periods is subject to transfer, demotion or separation.”

In May 2013 the complainant appealed to the WFP Executive Director against the decision not to change the unsatisfactory overall rating in his 2012 appraisal report, as well as the decision not to renew his fixed-term contract. The appeal was suspended at his request until 25 March 2015. On 22 May 2015 the WFP Executive Director upheld both decisions. The complainant appealed to the Appeals Committee against that decision on 10 July 2015.

In its report of 19 January 2018, the Appeals Committee, which had heard the complainant, recommended dismissing the appeal in its entirety, on the grounds that the 2012 PACE appraisal report was not vitiated by procedural flaws and that the decision not to renew the complainant’s contract was lawful as the temporary nature of the complainant’s fixed-term appointment enabled WFP to decide the non-renewal based solely on the “unsatisfactory” overall rating of his 2012 PACE appraisal report.

By a decision of 14 November 2018 the FAO Director-General decided to remove the 2012 PACE appraisal report from the complainant’s file on the ground that, mindful of Judgment 3879, he considered that it did not indicate whether the specific weighting ratio recommended in the PACE Instruction Booklet had been taken into account in reaching the “unsatisfactory” overall rating. As the complainant’s 2012 PACE appraisal report was set aside, so was the decision of non-renewal on

which it was based. The complainant's claim for reinstatement was dismissed, as there were no exceptional circumstances warranting his reinstatement, but he was awarded 70,000 euros in material and moral damages. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision, to order his reinstatement and to order the payment of all his salary and allowances from the date of his separation to the date of his reinstatement. He claims moral damages, as well as 5,000 euros in costs.

The FAO asks the Tribunal to dismiss the complaint.

In the meantime, the complainant filed an application for interpretation of Judgment 3879 arguing that, as the Tribunal had set aside his 2011 PACE appraisal report, the basis for the decision not to renew his contract on the ground of unsatisfactory service for two successive periods in 2011 and 2012 no longer existed. In Judgment 4179, delivered in public on 3 July 2019, the Tribunal dismissed the complainant's application for interpretation of Judgment 3879. The Tribunal found under consideration 4 that "point 2 of the decision in Judgment 3879 is clear and unambiguous. It means that, the Tribunal having set aside the complainant's 2011 PACE appraisal report and ordered its removal from his file, it is not to be taken into account as a valid PACE appraisal report affecting any decisions or actions concerning the complainant."

CONSIDERATIONS

1. The complainant joined WFP in May 2010 as an Internal Auditor at grade P-4 under a fixed-term contract. In his final probationary performance appraisal report his overall performance was rated as "satisfactory". His appointment was subsequently confirmed and renewed. At the material time, it was due to expire on 3 June 2013. It was not renewed after that date. His supervisor had rated his overall performance as "unsatisfactory" in his 2011 PACE appraisal report. His 2012 overall performance was also rated as "unsatisfactory". The memorandum of 2 May 2013, which informed the complainant that his appointment would not be renewed beyond its expiry date stated that that action was taken:

“[p]ursuant to WFP/FAO HR Manual [paragraph] 308.4.16: ‘A Staff Member whose service has been reported as unsatisfactory for two successive qualifying periods is subject to transfer, demotion or separation.’ Furthermore, WFP/FAO HR Manual [paragraph] 314.2.1 states: ‘A staff member who holds a confirmed appointment may be separated, following written warning, for failure to perform prescribed duties in a satisfactory manner [...]’. In addition, WFP/FAO HR Manual [paragraph] 305.5.123 provides: ‘Fixed-term appointments do not carry any expectation of, or imply any right to, extension or conversion to any other type of appointment; such appointments expire according to their terms, without notice or indemnity’.”

However, in Judgment 3879, delivered in public on 28 June 2017, the Tribunal held that the complainant’s 2011 PACE appraisal report was invalid. It accordingly set it aside, and ordered that it be removed from his file and disregarded for subsequent action.

2. The Director-General correctly decided, in the impugned decision of 14 November 2018, to reject the Appeals Committee’s recommendation that the complainant’s 2012 “unsatisfactory” overall rating was valid as “not well founded” and effectively set it aside. He also correctly decided that that PACE appraisal report would be removed from the complainant’s file. He further correctly decided, by extension, to reject the Appeals Committee’s recommendation to dismiss the complainant’s request to set aside the decision not to renew his fixed-term appointment, thereby accepting that that decision was unlawful. The complainant accepts that these decisions were correct. He however challenges other aspects of the impugned decision and the remedies which it awarded him, particularly the Director-General’s decision not to reinstate him to his post but to pay him 70,000 euros in material and moral damages for his “lost opportunity to be considered for renewal”.

3. The complainant takes particular issue with the following statement in the impugned decision:

“With regard to your request for reinstatement with full retroactive pay, I note that you were employed with [WFP] for the limited period of three years and that your fixed-term appointment provided that it had no expectation of renewal. I also note that, although your final PACEs for 2011 and 2012 have been set aside, your performance ratings during those periods have not been revised to ‘satisfactory’. Considering the lack of confirmed

satisfactory performance for 2011 and 2012, as well as your probationary appraisal, which, though satisfactory, also noted concern with your drafting of audit observations, there is no guarantee that your contract would have been renewed further notwithstanding the procedural issues concerning your PACEs. I therefore consider that there are no exceptional circumstances in this case warranting your reinstatement.”

4. In the Tribunal’s view, it was mistaken for the impugned decision to rely on the fact that the complainant’s 2011 and 2012 PACE appraisal reports gave him an “unsatisfactory” overall rating, and were not revised to satisfactory, as well as concerns that were stated in the complainant’s probationary appraisal (which actually gave a satisfactory rating), as bases for finding that his reinstatement was not warranted. Accordingly, the impugned decision will be set aside to the extent that it denied reinstatement. However, inasmuch as the complainant held a fixed-term appointment that expired on 3 June 2013 rather than a continuing appointment, and given the time that has passed, the Tribunal considers that it is not appropriate to order his reinstatement (see, for example, Judgment 4063, consideration 11).

Notwithstanding the setting aside of the impugned decision, the Tribunal considers that the award of 70,000 euros, which the Organization paid to the complainant for the lost opportunity to be considered for renewal, was reasonable. Accordingly, it will be unnecessary to award him any further sum in this regard. Although in the impugned decision the Director-General purported to “set aside” the decision not to renew the complainant’s fixed-term contract, the fact remains that the complainant was separated from service without a valid reason and was not reinstated. It is perhaps this, above all, that justifies the significant amount of damages awarded to him by the Director-General. There is no other basis for awarding further damages for the invalid 2012 PACE appraisal report and the unlawful decision not to renew the complainant’s appointment.

5. The complainant claims moral damages for excessive delay. It is well settled in the case law that internal appeals must be conducted with due diligence and in a manner consistent with the duty of care an international organization owes to its staff members. It is also settled

that the amount of compensation for unreasonable delay will ordinarily be influenced by at least two considerations. One is the length of the delay and the other is the effect of the delay. These considerations are interrelated as lengthy delay may have a greater effect. The effect of the delay will usually depend on, amongst other things, the subject matter of the appeal (see, for example, Judgment 4100, consideration 7).

6. It was on 31 May 2013 that the complainant filed his appeal against the Executive Director of the WFP's decisions rejecting his request to revise the overall "unsatisfactory" rating in his 2012 PACE appraisal report to "satisfactory" and to renew his appointment. However, the relevant period for the purpose of calculating delay for which the Organization may be responsible falls after 25 March 2015: the date to which the internal appeal proceedings were suspended at the complainant's request.

After this date, the WFP Executive Director upheld both contested decisions in May 2015. The complainant's appeal against this decision is dated 10 July 2015. The Appeals Committee issued its report to the FAO Director-General on 19 January 2018. This was about two years and two months after the last pleadings were filed on 12 November 2015 when the Organization submitted its surrejoinder. The Appeals Committee scheduled a hearing on 23 October 2017. The impugned decision was issued on 14 November 2018: about ten months after the Appeals Committee had issued its report. The relevant period of delay in the internal appeal proceedings was about three years and eight months. This was too long. It was not in keeping with the Organization's duty of care to the complainant, which required it to ensure that the internal appeal was conducted with due diligence.

7. Regarding the impact of that delay, the complainant states that it caused him injury that was even more serious because he was unfairly separated from WFP in June 2013 when the appeal proceedings were ongoing, although he had requested that his appointment be extended until those proceedings were finalized. He states that he has "been mistreated, discriminated [against] and denied [...] opportunities to join other UN Organizations" until the final decision was given.

The FAO submits that the complainant is mistaken because Manual paragraph 331.3.25 states that the filing of an appeal does not have the effect of suspending the implementation of an administrative decision which is the subject of the appeal. While the Tribunal finds no ground on which to hold that the complainant was discriminated against on account of the delay, the FAO's submission does not mean that the length of the delay in the internal appeal proceedings did not cause him injury, albeit that he might not have stated it forensically or with precision. He was obviously anxious over his employment situation but did not pursue other employment options as diligently as he might have done with the hope that he may have been reinstated. The Tribunal holds that this consideration in light of the length of the delay entitles the complainant to moral damages, for which he will be awarded 5,000 euros.

8. The complainant seeks 5,000 euros in costs. The FAO opposes this request on the ground that as the complainant is represented by the Legal Officer of the Association of Professional Staff whose function is funded by the FAO, an award of costs would amount to double payment of legal fees. As the complainant has not disputed this, the Tribunal will award no costs.

DECISION

For the above reasons,

1. The impugned decision of 14 November 2018 is set aside to the extent that it denied reinstatement.
2. The FAO shall pay the complainant moral damages in the amount of 5,000 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 1 November 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

HUGH A. RAWLINS

YVES KREINS

DRAŽEN PETROVIĆ