

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**T.**  
**v.**  
**FAO**

**129th Session**

**Judgment No. 4231**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. T. against the Food and Agriculture Organization of the United Nations (FAO) on 2 May 2018 and corrected on 23 May, the FAO's reply of 4 September, the complainant's rejoinder of 8 November 2018 and the FAO's surrejoinder of 8 February 2019;

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 challenges the decision not to extend his fixed-term appointment and to place him on special leave with pay until his contract expired. He also challenges a Director-General's Bulletin.

The complainant joined the FAO on 8 March 2008 as Assistant Director-General and Regional Representative of the Regional Office for Africa (ADG RAF) under a three-year contract. With effect from 18 August 2008 he was appointed ADG for the Agriculture and Consumer Protection Department. His appointment was regularly extended until December 2012.

In October 2012, he was approached by the Deputy Director-General for Operations to find out whether he was interested in the upcoming position of Head of the Addis Ababa (Ethiopia) Office which had been created by the new Director-General. The complainant expressed interest in that position and prepared a draft concept note listing the specific objectives of the new Office and proposing that the Director-General should turn the existing Sub-Regional Office for East Africa into a fully-fledged Liaison Office with African institutions in Addis Ababa (LOA). Following some discussions, the draft was reviewed and amended. The final concept note was dated 15 October 2012 and, according to the complainant, was endorsed by the Director-General during a working lunch. The complainant's appointment to the position of Head of the Addis Ababa Office was announced on the FAO's Intranet on 22 October and, subsequently, in Director-General's Bulletin No. 2012/69 of 28 December 2012. On 21 December 2012 the Deputy Director-General for Operations informed the Shared Services Centre of the complainant's appointment so that the necessary administrative formalities could be undertaken. He specified that the post was at D-2 grade, that the complainant would be transferred to the new post as of 1 January 2013 for a renewable period of one year and that the appointment was expected to continue beyond two years. By a letter dated 14 January 2013 the Director-General formally confirmed the appointment and informed the complainant that "[m]ore details regarding [his] role and functions [...] w[ould] be developed shortly".

On 8 June 2013 the complainant submitted a progress report to the Deputy Director-General for Operations arguing *inter alia* that there was a significant amount of confusion regarding his role and expressing his disappointment as to the fact that he "ha[d] just been demoted from an ADG position to a [D] position". He stated that he was willing to accept another position in the Organization should the LOA project no longer be a priority. On 24 June the Deputy Director-General for Operations replied to the complainant reassuring him that the "plans" relating to the Addis Ababa Office remained unchanged. In November the complainant's contract was extended for one year. On 7 December 2013 the Deputy Director-General for Operations reported to the complainant the outcome of a series of meetings he had with the Director-General

regarding his role. The complainant was informed that as Head of the Addis Ababa Office he would henceforth have to report to the ADG RAF with respect to some particular issues.

On 24 April 2014 Director-General's Bulletin No. 2014/18, entitled "Role and Reporting Lines of the Head of the FAO Office in Addis Ababa", was published. By a letter of 5 May 2014 addressed to the Director-General the complainant expressed his disappointment with the Bulletin, stating that the terms of reference it contained were significantly different from those discussed with him and agreed in the concept note of 15 October 2012 and that he felt "deceived by the unilateral changes in the terms of [his] service". He suggested that the Director-General should "reconsider (in the best interest of the Organization) [his] personal situation and draw from it appropriate lessons that respect [his] professional career and take into account the detrimental effect of the unfair treatment inflicted on [him] and [his] family since [his] transfer to Addis Ababa".

The Director-General replied on 9 June observing that the purpose of his Bulletin No. 2014/18 was to clarify the functions of the FAO Office in Addis Ababa "based on the experience gained to date". He expressed surprise as to the complainant's reference to "unfair treatment" and informed him that there were currently no other positions for which his skills could be efficiently used. He concluded by stating that, if the complainant saw no reason for staying in his position in Addis Ababa, he was ready to receive his resignation. On 17 June the complainant responded that he had no intention to resign but, should the Director-General consider using his right to dismiss him, he was willing to accept an amicable settlement of separation. He asserted that the provisions in Bulletin No. 2014/18 and the clarifications provided on 9 June constituted a "premeditated measure planned in advance to demote [him] (while flattering [his] skills and work experience) hoping to push [him] out by resignation".

On 4 July the complainant was informed of the Director-General's decision to place him on special leave with pay with effect from 7 July until 31 December 2014, the date of expiry of his appointment, and not to renew his contract beyond that date.

On 29 September 2014 the complainant asked the Director-General to reverse the decision of 4 July and reconsider his personal situation. As this appeal was dismissed by a decision of 1 December 2014, the complainant referred the matter to the Appeals Committee in January 2015 arguing, among other things, that he was the victim of reprisals, abuse of authority and demotion. He requested inter alia that the latter decision and the provisions of Bulletin No. 2014/18 that were incompatible with the concept note of October 2012 be set aside, that he be reinstated in a post commensurate with his initial grade as from 1 January 2015 or, alternatively, that he be paid an indemnity equivalent to eighteen months' salary for wrongful dismissal, plus an "exemplary redress for the moral injury [he] ha[d] suffered for harassment and bad faith" in the amount of at least 200,000 United States dollars.

The Appeals Committee issued its report on 4 December 2017. It found the appeal to be receivable, except for "the claim concerning the demotion from ADG to D-2" which was time-barred. On the merits, it considered that the complainant had not provided conclusive evidence of a binding commitment linked to the promise which was supposedly made to him in the concept note of October 2012. As to the decision to place the complainant on special leave with pay and not to extend his appointment beyond the expiry date, it considered that it was justified. It therefore recommended that the appeal be dismissed.

By a letter of 12 March 2018, which constitutes the impugned decision, the Director-General informed the complainant that he had decided to accept the Appeals Committee's recommendation.

On 2 May 2018 the complainant filed a complaint with the Tribunal requesting the setting aside of the impugned decision, his reinstatement through to retirement age or, alternatively, the payment of compensation in an amount equivalent to eighteen months' salary, plus contributions to the United Nations Joint Staff Pension Fund, the reimbursement of the salary differential for *de facto* demotion from ADG grade to D-2 grade and the payment of six months' salary in compensation for the moral injury which he considers he has suffered for the harm to his professional reputation and to his dignity, as well as compensation for the inordinate

delay in adjudicating his case. He also seeks punitive damages and costs in the amount of 20,000 United States dollars.

The FAO submits that the complaint is irreceivable *ratione temporis* to the extent that it concerns the complainant's transfer to Addis Ababa, and that his claims of *de facto* demotion and for punitive damages are irreceivable for failure to exhaust the internal means of redress. It asks the Tribunal to dismiss the complaint in its entirety.

### CONSIDERATIONS

1. The complainant impugns the Director-General's decision, dated 12 March 2018, which accepted the recommendation made by the Appeals Committee to dismiss his appeal against the Director-General's decision of 4 July 2014 to place him on special leave with pay from 7 July 2014 to 31 December 2014 (when his fixed-term appointment was due to expire) and not to renew his appointment beyond that expiry date. This was less than two years from his age of retirement. The Appeals Committee had also recommended the rejection of the complainant's challenge to Director-General's Bulletin No. 2014/18, which was published on 24 April 2014. That Bulletin had redefined the complainant's role as Head of the FAO Office in Addis Ababa (particularly his reporting lines) to which he was appointed as of January 2013 on a one-year fixed-term contract that was subsequently renewed for another year from January 2014.

2. The FAO states that it "accepts the competence of the Tribunal to entertain this [c]omplaint" but submits that much of the complainant's case is founded on his transfer to Addis Ababa, including issues relating to the grade at which he was appointed to that Office. It argues that those matters are irreceivable in the Tribunal. This, the FAO argues, is because the complainant was transferred to the Addis Ababa Office with effect from 1 January 2013 and lodged his appeal with the Director-General on 29 September 2014 making that appeal time-barred pursuant to Staff Rule 303.1.311. This provision mandates that an appeal be filed within ninety days from the date of receipt of the contested decision.

It is however plain that the complaint is directed against the impugned decision's acceptance of the Appeals Committee's recommendation adumbrated in consideration 1 foregoing and that the complainant refers to matters concerning the circumstances of his transfer to Addis Ababa, including his reduction in grade and *de facto* demotion, merely to support grounds of his challenges to the impugned decision. Accordingly, the FAO's objection to the receivability of these matters is rejected. However, as the FAO submits, the complainant's claim for punitive damages is irreceivable in the Tribunal as it was not raised in the internal appeal.

3. The Tribunal's case law states that an organisation enjoys wide discretion in deciding whether or not to renew a fixed-term appointment. The exercise of such discretion is subject to only limited review as the Tribunal respects the organisation's freedom to determine its own requirements and the career prospects of staff. However, the discretion is not unfettered and the Tribunal will set the decision aside if it was taken without authority or in breach of a rule of form or of procedure, or if it rested on an error of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence (see, for example, Judgments 4062, consideration 6, and 4146, consideration 3).

4. The complainant argues that the decision to place him on special leave with pay for approximately six months and not to extend his appointment should be set aside. He contends that that decision was taken "[in] breach of promise and [in] wrongful termination" of his appointment and in breach of his legitimate expectation to have his appointment extended; and that the Director-General's "abuse of authority and harassment created a hostile working environment violating [his] right to fair treatment [...] leading to [his] premature separation from service". The complainant further contends that the decision was taken in breach of his right to a proper administrative position as well as in breach of the stipulated procedure for placing him on special leave with pay. He points out that, as he had argued before the Appeals Committee, the exceptional circumstances surrounding the decision to place him on

special leave with pay to the end of his contract and to terminate his appointment thereupon rendered that decision a disguised disciplinary measure amounting to the “forced termination” of his appointment.

5. The complainant relies on Judgment 3596 particularly to support his case that the FAO unlawfully placed him on special leave with pay. Since there are undoubted parallels between that case and the present case, circumstances and findings in that judgment will be recalled so far as they are relevant to this case.

6. In Judgment 3596, the complainant, an FAO country representative, whose fixed-term appointment was due to expire on 31 December 2011, received a memorandum, dated 27 May 2011, from the FAO’s Regional Representative notifying him (the complainant) that he intended to recommend to the Director-General that his (the complainant’s) appointment should not be renewed beyond its expiry date and that he should be placed on special leave with pay as of 1 July 2011. Prior to that, by an email dated 31 March 2011, the contents of a letter of 22 February 2011, which was sent by the Ministry of Agriculture and Forestry in the complainant’s duty country to the FAO Headquarters, were forwarded to the complainant. That letter criticized the complainant’s manner of working, particularly his alleged lack of cooperation with the Ministry. The complainant submitted comments on that letter admitting that he had not been proactive with regard to certain projects owing to a shortage of qualified staff. He also stated that he had inherited a somewhat dysfunctional situation following the dismissal of a colleague. He was again invited to comment upon the 27 May memorandum but did not do so despite several reminders. A letter dated 30 June 2011, the receipt of which he acknowledged on 2 July 2011, informed the complainant that the Director-General had accepted the recommendations in the 27 May memorandum.

The Tribunal dismissed as unfounded the complainant’s plea that the decision not to extend his appointment beyond the expiry date was unlawful finding that that decision did not constitute dismissal. It cited its case law in consideration 4 of Judgment 2171. It had there stated that the non-renewal of a fixed-term contract is not the same thing as termination.

It had also noted in Judgment 2171 that UNESCO Staff Rule 109.3 (which is similar to FAO Staff Rule 302.9.7) provided that a fixed-term appointment “shall expire automatically and without notice or indemnity on the expiration date specified in the letter of appointment” and that separation as the result of the expiration of such an appointment “shall not be deemed to be a termination within the meaning of the Staff Regulations and Rules”. For the same reasons, the complainant’s plea in the present case that not extending his fixed-term appointment constitutes an unlawful termination is unfounded. Moreover, as the Tribunal found in consideration 4 of Judgment 3596, the virtual six months’ notice which the FAO gave the complainant was reasonable notice for the non-renewal of his fixed-term appointment. The Tribunal had further found, in Judgment 3596, that the complainant had not cited any provision of the Staff Regulations which would have guaranteed his right to an extension of his appointment beyond its expiry date. The complainant in the present case has similarly cited no such provision.

7. In Judgment 3596, consideration 4, the Tribunal found that the complainant’s plea that the decision not to extend his appointment was vitiated on the basis that he might have legitimately expected that it would have been extended was devoid of merit. It found that the complainant did not rely on any such assurances.

In his brief in the present case, under the rubric “Issues surrounding legitimate expectations”, the complainant contends that the FAO’s actions which ultimately culminated in the decision not to extend his appointment breached its promise to him, first, that his one-year appointment would have been extended by at least two years. He relies on the statements in the email which the Deputy Director-General for Operations sent to the Shared Services Centre on 21 December 2012 informing it that the complainant was appointed to the Addis Ababa Office with effect from 1 January 2013 “with an assignment up to 31 December 2013 (renewable)” and that the appointment was “expected to continue beyond two years and therefore full transfer entitlements should be granted”.

8. In the second place, the complainant insists that, as Head of the newly created LOA, his functions were to be based on the concept note which he had drawn up in 2012. Citing the Tribunal's case law in Judgments 782, consideration 1, and 3619, consideration 14, he states that he relied on the alleged promises when he agreed to relocate to Addis Ababa, thereby making a significant personal and professional commitment. He insists that the FAO did not fulfil its promises and instead thwarted them by issuing Director-General's Bulletin No. 2014/18 whose terms significantly departed from the concept note. The complainant also submits that by issuing the Bulletin, the FAO unilaterally altered the terms of his service and caused him injury as the result was the termination of his appointment and the ending of his career.

9. The plea of breach of promise is unfounded. In the first place, the complainant has failed to prove that the FAO made a binding promise to him that his appointment would automatically have been extended when it expired on 31 December 2014. In any event, at most, the email of 21 December 2012, which was not directly addressed to him, merely raised an expectation that the appointment may have continued beyond two years. In the second place, there is no evidence that the FAO made a binding promise to the complainant that the terms of his service as Head of the Addis Ababa Office would have been based on the concept note. Article VII, paragraph 4, of the FAO Constitution and Rule XXXVIII, paragraph 1, of the General Rules gave the Director-General "full power and authority to direct the work of the [FAO]" (in the interest of the Organization) subject to the general supervision of the Conference and the Council.

It is apparent from the correspondence between the parties that the role of the new LOA and aspects of the complainant's functions as its Head were evolving before and after his appointment to that Office. The concept note was an aspect of that process, but it did not fetter the Director-General's discretion under the foregoing provisions to regulate the aspects of the Office addressed in Bulletin No. 2014/18. As the Appeals Committee noted, the FAO had on several occasions informed the complainant that the concept note was to be used purely as an internal document and its proposals would have required discussions within the

governing bodies. It is additionally observed that the complainant has not asserted that Director-General's Bulletin No. 2014/18 was implemented by an irregular procedure. The complainant's challenge to the Bulletin therefore fails.

10. The complainant's plea that the non-extension of his appointment was a disguised disciplinary measure amounting to constructive dismissal is unfounded. In the first place, the notion of constructive dismissal is inapplicable in the present case. The FAO opted not to extend his contract on its expiry. Constructive dismissal, on the other hand, signifies that an organisation has breached the terms of a staff member's contract in such a way as to indicate that it will no longer be bound by that contract. A staff member may treat that as constituting constructive dismissal with all the legal consequences that flow from an unlawful termination of the contract, even if she or he has resigned (see Judgments 2745, consideration 13, and 2967, consideration 9). Moreover, in the Tribunal's view, the circumstances which culminated in the non-extension may lead to conjecture (but are not proof) that the decision may have been a hidden sanction. This is given the contents of the exchanges in his progress report of 8 June 2013 to the Deputy Director-General for Operations, his letter of 5 May 2014 to the Director-General; the latter's reply of 9 June 2014 and the complainant's response of 17 June 2014 culminating in the letter of 4 July 2014, which contains the contested decision. However, as the Tribunal has consistently stated, in Judgment 2907, consideration 23, for example, "the existence of a hidden disciplinary measure cannot be inferred from mere conjecture and could not be accepted unless it were proven". Additionally, the complainant provides no evidence from which the Tribunal may conclude that the circumstances which led up to the non-extension of his appointment amounted to harassment, abuse of authority (as explained in Judgment 3939, consideration 10, for example), bad faith or breach of the FAO's duty of care towards him (as explained in Judgments 2720, consideration 12, 3861, consideration 9, and 3902, consideration 11, for example). These pleas accordingly fail.

11. The complainant argues that the FAO had a duty to reassign him to another post. He states that “even if the Director-General no longer wished [him] to remain in [his] position, there was a duty to consider [him] for other postings as an internal candidate in need [of] placement” and that regarding his placement on special leave with pay, “it should be noted that this occurred without any undertaking by the Administration to see if there were some other post[s] for which [his] services could be effectively utilized”, given that there were posts for which he was fully suited. He insists that this was one procedural issue which the Appeals Committee failed to consider in detail reflecting disregard for due process. These pleas however fail. Ordinarily, in the absence of a specific provision to the contrary, an organization’s duty to reassign a staff member arises only when a post is abolished (see, for example, Judgment 4037, consideration 12). The complainant’s further plea that his right to due process was breached because the Appeals Committee did not hold a hearing in which witnesses were called also fails. According to Staff Rule 331.3.62, it is within the discretion of the Appeals Committee to determine whether hearings are necessary so it was under no obligation to call the witnesses whom the complainant wished it to hear (see, for example, Judgment 3846, consideration 6).

12. The complainant submits that the Appeals Committee erred when it found that his letter of 5 May 2014 to the Director-General requesting to be reassigned had given the FAO the “unavoidable and unsolicited opportunity” to place him on special leave with pay even though he had not requested such special leave. He refers to Staff Regulation 301.5.2 and Staff Rule 302.5.21. The former provision states as follows: “Special leave may be authorized by the Director-General in exceptional cases.” The latter provision states: “Special leave, with full or partial pay or without pay, may be authorized for training or research in the interest of the Organization, for extended illness, or for other important reasons for such periods as the Director, Human Resources Management Division may determine.”

13. The FAO notes the Tribunal’s finding in consideration 7 of Judgment 3596 that the subject special leave is perceived as a privilege granted to staff and that, by unilaterally placing the complainant in that

case on special leave in order to deprive him of his functions, the FAO had breached the provisions on which it relied and had taken a decision for a purpose other than those contemplated in the provisions thereby committing an error of law and an abuse of authority. The FAO adverted to statements which the Tribunal then made in consideration 9 of the said Judgment 3596 that removing the complainant from his functions, even if it should have taken a different form, was legitimate in substance; that it was clear that the FAO had good reason to consider that his action at the duty station and the manner in which he conducted the operations for which he was responsible were such as to jeopardise the FAO's credibility with the authorities of the country concerned and had thereby compromised their success. The FAO then made observations concerning the application of Staff Rule 302.5.21, which are unnecessary to detail here given the purport of that Staff Rule.

It needs to be pointed out, however, that the Tribunal's finding in consideration 7 of Judgment 3596 merely accepted that special leave pursuant to Staff Rule 302.5.21 is intended as a privilege for the benefit of staff members for the reasons stated in that Rule "or for other important reasons", which, in effect, must similarly be for the benefit of staff members by virtue of the *ejusdem generis* rule. Accordingly, in that case, as in the present case, the FAO committed an error of law and an abuse of authority when it used Staff Rule 302.5.21 unilaterally, for a purpose which was extraneous to the Rule, and in the manner in which it did.

14. In the foregoing premises, the complainant's plea that the FAO committed an error of law and an abuse of authority when it placed him on special leave with pay some six months prior to the expiration of his appointment is well founded. The impugned decision of 12 March 2018, as well as the decisions of 4 July 2014 and 1 December 2014, will be set aside insofar as they concern the placement of the complainant on special leave. The complainant will be awarded moral damages for the harm to his professional reputation and to his dignity that he states he has suffered as a result of the unlawfulness of the decisions. The Tribunal assesses those damages at 10,000 United States dollars.

As the complainant has not shown that the non-renewal of his contract was unlawful, the question of reinstatement does not arise.

15. The complainant submits that he is entitled to compensation for the inordinate delay (over three years) in the process, from the submission of his appeal to the Director-General on 29 September 2014 to the issuing of the impugned decision on 12 March 2018. The Tribunal accepts that the delay in the internal appeal process was excessive. However, the request for moral damages will be rejected as the complainant has not articulated the adverse effects of the delay.

16. The complainant, who has been successful only in part in these proceedings, is entitled to an order for costs which the Tribunal assesses in the sum of 4,000 United States dollars. All other claims should be dismissed.

#### DECISION

For the above reasons,

1. The impugned decision of 12 March 2018 and the decisions of 4 July 2014 and 1 December 2014 are set aside insofar as they concern the placement of the complainant on special leave.
2. The FAO shall pay the complainant 10,000 United States dollars in moral damages.
3. The FAO shall also pay the complainant 4,000 United States dollars in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 23 October 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ