

The Administrative Tribunal,

Considering the complaint filed by Mr R. W. H. against the Food and Agriculture Organization of the United Nations (FAO) on 7 December 2002, the Organization's reply of 30 June 2003 and the complainant's e-mail message of 14 October 2003 informing the Registrar that he would not file a rejoinder;

Considering Article II, paragraph 5, 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 was born in 1956 and has Canadian nationality. From April 1999 he was employed by the World Food Programme (WFP), which is an autonomous joint subsidiary programme of the United Nations and the FAO, as a consultant, for a period of three months. On 20 July 1999 he began a one-year fixed-term contract, at grade P.4, as Logistics Officer/Base Manager at the Lokichokio duty station in Kenya. In July 2000 his contract was extended until 18 January 2001.

In August 2000 the complainant's immediate supervisor informed the Chief of the Staff Relations and Servicing Branch (HRS) of three incidents concerning the complainant. Firstly, he reported that labour relations with casual workers at the Lokichokio base had deteriorated to such an extent that he had been obliged to intervene on several occasions between January and June; secondly, he stated that the complainant had failed to implement a recommendation concerning the issuing of passenger identification cards; and thirdly, he considered that the complainant had exposed him to a serious security risk by disclosing his imminent arrival at Lokichokio in an e-mail communication.

By an e-mail message of 22 August the Chief of HRS informed the complainant that these three incidents were being investigated and invited him to submit comments. The complainant replied at length in a series of e-mail messages sent on 27 August. He refuted his supervisor's allegations and complained that his integrity and character had been "irreparably damaged" by them. The complainant's response was examined by a review group comprising four senior officials.

By a memorandum of 11 September 2000 the Director of the Human Resources Division (HR) notified the complainant of the Programme's intent to terminate his contract with effect from 22 September. She stated that the first incident reported by the complainant's supervisor brought into question his ability to manage staff, whilst the second showed that he did not follow instructions; "these lapses demonstrate[d] a less than optimum exercise of judgment on [his] part as Base Manager". In the event, the complainant's contract was not terminated until 27 October, due to administrative difficulties in arranging for his repatriation.

On 24 November 2000 the complainant lodged an appeal with the Executive Director of the Programme, against the decision to terminate his contract, contending that he had been given no prior indication that his performance was unsatisfactory, that the investigation into his supervisor's allegations had not complied with the applicable procedure and that the notice of termination had not specified appropriate reasons. He asked to be reinstated in his post until the expiry of his contract, with all references to dismissal for unsatisfactory performance being deleted from his personnel records, and to be granted *per diem* payments for the period from 3 to 27 October, during which his repatriation had been delayed. In reply, the Executive Director agreed that his salary and a daily subsistence allowance should be paid up until 27 October 2000, in view of the postponement of his repatriation, but rejected the remainder of his request as unfounded.

The complainant filed an appeal with the FAO Appeals Committee on 4 April 2001. The Committee considered that the termination procedure had been flawed and that the contested decision should therefore be set aside. It recommended that all reference to the complainant's dismissal be removed from his record and that he be paid an amount equivalent to the salary and allowances he would have received up to the end of his fixed-term contract. The Committee also recommended an award of 4,000 United States dollars in costs.

The Director-General decided to accept these recommendations and informed the complainant accordingly by a letter of 16 August 2002. That is the impugned decision.

B. The complainant considers that the impugned decision does not provide sufficient compensation for the professional and moral injuries he has suffered. He submits that the proposed compensation is "completely unacceptable" as compensation for wrongful termination, and deplores the fact that it "does not send any message of serious violation of [statutory procedures] to [the Organization] or the general staff members as a whole". He also asserts that, as a result of the impugned decision, he was denied the opportunity of obtaining an indefinite appointment, since these new contracts were in the process of being introduced by the Programme at the time of his termination.

He claims professional and moral damages in an amount equal to his salary and benefits from the revised date of his termination (27 October 2000) until the date of the impugned decision (16 August 2002). He also asks the Tribunal to order the defendant to establish an "office of the Ombudsman or similar staff entity to protect the [...] rights and welfare of [...] staff members".

C. The Organization, which emphasises that the offer of compensation as stated in the impugned decision still stands, replies that the complainant's claims for additional damages are unfounded. It argues that, given the nature of his appointment and the fact that it was clearly unlikely to be renewed, there is no legal basis for paying him material damages in respect of the period after 18 January 2001, when his contract was due to expire. Nor does it see any justification for an award of moral damages, in view of the circumstances surrounding his termination and the professional shortcomings on which it was based.

The Organization contends that the complainant's claim for the creation of an office of Ombudsman is irreceivable, firstly because it was not raised before the Appeals Committee, and secondly because it lies outside the jurisdiction of the Tribunal.

CONSIDERATIONS

1. The complainant commenced work with the WFP as a consultant for Albania on 13 April 1999. On 25 June of that year he was offered a one-year fixed-term contract as Logistics Officer/Base Manager stationed in Lokichokio, Kenya, which he accepted. His contract took effect on 20 July 1999 and was renewed on 19 July 2000 for a period of six months, with an expiry date of 18 January 2001.
2. By a memorandum of 11 September the complainant was notified, in circumstances which will be detailed later, that his contract would be terminated on 22 September and that arrangements would be made for his repatriation on that day. As it happened, he could not be repatriated at that stage with the result that, ultimately, the effective date of his termination was 27 October 2000.
3. The complainant lodged an appeal with the FAO Appeals Committee on 4 April 2001. In his appeal, he sought damages equivalent to his salary and allowances from the date of his termination until the date of the Appeals Committee's report without prejudice to "the right to request further additional financial compensation as a result of defamation of character and integrity, mental anguish and distress and actual financial costs incurred up to that date".
4. The Appeals Committee reported to the Director-General of the FAO on 29 April 2002. The Committee was of the view that the process leading to the complainant's early termination was "unreasonably brief" and that, in that process, the WFP had "failed to observe a duty of fairness". Moreover, the Committee expressed the view that "the reasons indicated for terminating [his] fixed-term contract [...] were not sufficiently substantiated". In conclusion, it recommended that the decision to terminate the complainant's contract be set aside, that any reference thereto be removed from his employment record, that he be paid an amount equivalent to the salary and allowances to which

he would have been entitled until the end of his contract and 4,000 United States dollars in costs.

5. On 16 August 2002 the Director-General informed the complainant that he had decided to accept the Committee's recommendations. It should be noted, at this stage, that it is stated in the FAO's reply that the Director-General is still prepared to implement those recommendations.

6. The complainant brings the present proceedings with respect to the Director-General's decision to implement the recommendations of the Appeals Committee which, he contends, are inadequate to compensate him for the damage he has suffered. In lieu, he seeks professional and moral damages equivalent to salary and benefits from 27 October 2000 when his termination took effect until the date of the Director-General's decision, namely, 16 August 2002. Additionally, he seeks the "[c]reation of an Office of the Ombudsman or similar staff authority to protect the [...] rights and welfare of the staff members [of the WFP]".

7. The FAO contends that the complainant is not entitled to damages beyond those recommended by the Appeals Committee, whether by way of compensation for early termination or for moral injury. Additionally, it argues that his claim for the creation of an office of Ombudsman is irreceivable.

8. So far as concerns the claim for the creation of an office of Ombudsman, the complaint is clearly irreceivable. In this regard, it is sufficient to note that this claim was made for the first time in the complaint to the Tribunal and, accordingly, no decision could have been made on that issue prior to the filing of the complaint. More importantly, the claim does not concern the non-observance of the complainant's terms of appointment or of the provisions of the Staff Regulations of the FAO, they being the only matters upon which this Tribunal is competent to adjudicate.

9. The FAO does not contend that the complaint is irreceivable insofar as the complainant seeks material damages. As already mentioned, the complainant sought damages equivalent to his salary and allowances from the date of the termination of his contract up to the date of the Committee's report, without prejudice to his right to seek further damages thereafter. The Director-General's decision to implement the recommendations of the Appeals Committee is, thus, properly to be seen as embodying a final decision not to compensate the complainant beyond the payment of salary and allowances up to the date on which his contract would have expired in the normal course. To the extent that the complainant maintains the claim he made before the Appeals Committee, the complaint is receivable. However, to the extent that the claim goes beyond what was then in issue, the complaint is irreceivable, since the Director-General's decision cannot be regarded as a decision, whether final or not, on that part of the claim made for the first time before the Tribunal.

10. As a general rule, damages for breach of contract, including wrongful termination of a contract of employment, are confined to the amount necessary to put the injured party in the position he or she would have enjoyed if the contract had been performed. Thus, ordinarily, an employee is entitled, in the case of wrongful termination, to salary and entitlements only up to the date on which the contract would normally have expired.

11. Of course, in some circumstances, material damage may extend beyond the salary and allowances that would otherwise have been paid during the course of the contract. Thus, for example, an employee may be entitled to additional compensation if it is shown that he or she lost a valuable chance of having the contract renewed or extended.

12. The complainant contends that early termination of his contract deprived him of the opportunity to obtain an indefinite appointment, that being an appointment of a kind which was, at the relevant time, being introduced by the Programme to replace certain staff contracts. This argument cannot succeed. The complainant was employed under a fixed-term contract for the limited period of 12 months. That contract was extended, but only for a further limited period of six months.

13. It is not disputed that, as found by the Appeals Committee, "the relationship between the [complainant] and his supervisor was of a very antagonistic nature". Quite apart from that difficulty, the situation in Lokichokio was volatile as a result, according to the complainant, of the "violent nature of the local community". In what was obviously a difficult and dangerous situation, the complainant's performance had been rated as "marginal" in his probationary performance appraisal report, it being said in that report that he "fail[ed] to meet some major job requirements". Although the procedures attending the performance appraisal report may be open to some criticism, a matter on which it is unnecessary to make any finding, the above matters make it impossible to assume in the complainant's favour that his contract as Base Manager at Lokichokio would have been renewed when its term

expired. And there is nothing to support an inference that, at that stage, he would have been offered further employment with the WFP.

14. It follows that the complainant is entitled by way of material damages to an amount equivalent to the salary and allowances he would have received from the effective date of termination until the date on which his contract would normally have expired, but not beyond the latter date.

15. The Appeals Committee found that "the [complainant's] dignity had been harmed by the administrative procedure leading to termination and that some redress for the material and moral injury he suffered [was] warranted", a finding that is not disputed in these proceedings. Notwithstanding that finding, the Committee only recommended payment of an amount equivalent to salary and allowances until the end of the complainant's fixed-term contract. As already explained, he was entitled to that amount for material damage. Thus, the effect of the recommendation of the Appeals Committee was to deny the complainant compensation for moral injury notwithstanding its finding that his dignity had been harmed. That was an error of law and, as the Director-General's decision was based on the recommendations of the Appeals Committee, it necessarily involves the same error of law. Accordingly, to the extent that that decision is a decision not to pay the complainant damages beyond the amount recommended by the Appeals Committee, it must be set aside.

16. The question of the complainant's entitlement to moral damages necessitates consideration of the circumstances surrounding the early termination of his contract and the steps by which he sought review of that decision. The events leading to the termination began on 22 August 2000 with an e-mail from the Chief of the Staff Relations and Servicing Branch informing him that his immediate supervisor had reported three incidents which might involve "the imposition of disciplinary measures". The incidents concerned labour problems with casual employees at the local airstrip, failure to implement security recommendations with respect to passenger identification cards and the sending of an e-mail which, it was said, "could have had the result of placing [his supervisor's] life in danger". He was asked to respond by 28 August 2000.

17. The complainant responded to the allegations, which he characterised as "vague", on 27 August 2000. He enquired as to the progress of the investigation on 3 September and, at the same time, expressed concerns about future appraisals by his immediate supervisor. He claims to have been informed by telephone, on 8 September, that the first two allegations had been found to be substantiated, but not the third. He also claims to have been told that he had a choice of resigning or having his contract terminated. On 13 September he was informed that it had been decided that he would not continue in his role as Base Manager, because of worsening labour relations and the non-implementation of security recommendations relating to identity cards. He was further informed that, as there was no other post to which he could immediately be reassigned, his contract would be terminated.

18. At this point, it is convenient to note the unchallenged finding of the Appeals Committee that there was antagonism between the complainant and his supervisor and its statement that the latter "did not handle the case objectively and fairly". In this regard, the Committee noted that the complainant had not been given an opportunity to comment on the probationary performance appraisal made shortly before his supervisor reported the incidents leading to the early termination of his contract. Additionally, it expressed doubt as to whether, given the complainant's unfamiliarity with the relevant rules and regulations and the remoteness of his duty station, he appreciated the possible consequences of the request to comment on the allegations made against him. Further, it doubted whether sufficient time had been granted to him to reply to those allegations. In addition to the matters noted by the Appeals Committee, it is clear that the complainant was neither informed of the possibility of early termination of his contract nor given an opportunity to put an argument against that course in the event that the allegations were found to be substantiated.

19. On 15 September 2000 the complainant sought intervention by the Executive Director of the WFP and received in reply an e-mail from the Director of the Human Resources Division detailing the administrative steps leading to the termination of his appointment. In that reply, it was stated that the original allegations had been made by his supervisor, that his supervisor's report had been endorsed by the Regional Manager and "reviewed by the Regional Director [...] and by HR", and that his response to the allegations had then been reviewed by "the Regional Director, the Director [of the Transport and Logistics Division] and HR". Of the latter review, the Appeals Committee noted that it had been conducted "by a group of officers having [an] interest in the matter" and that the Programme's submissions "contained some confidential and prejudicial documents [referring] to the [complainant] but which were apparently not copied to him". In that context, the Appeals Committee stated:

"[...] an administrative process leading to a decision as important as termination before expiry of a fixed-term appointment should guarantee due process and transparency. In this connection, [the Programme] should have asked the [complainant] to come to Headquarters in order to ensure a thorough enquiry and verification of the case."

20. For the sake of completeness, it is necessary to mention only that the complainant filed an appeal with the Executive Director of the WFP. The appeal was allowed to the extent necessary to make his termination date coincide with the date of his repatriation, but otherwise rejected as unfounded.

21. Given the unsatisfactory nature of the administrative processes which led to the early termination of the complainant's contract and, in particular, the lack of due process, the want of transparency and the "unreasonably brief" nature of those processes, as found by the Appeals Committee, the complainant should be awarded moral damages in the amount of 5,000 United States dollars.

DECISION

For the above reasons,

1. To the extent that the decision of the Director-General of 16 August 2002 embodies a decision not to pay the complainant any sum beyond that recommended by the Appeals Committee, that decision is set aside.
2. The FAO shall pay the complainant moral damages in the amount of 5,000 United States dollars in addition to implementing the recommendations of the Appeals Committee.
3. All other claims are dismissed.

In witness of this judgment, adopted on 13 November 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet