

W. (No. 3)

v.

FAO

(Application for review)

125th Session

Judgment No. 3899

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 3882 filed by Mr H. W. on 29 August 2017 and corrected on 5 September 2017;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. The complainant applies for a review of Judgment 3882, delivered in public on 28 June 2017, in which the Tribunal ruled on his second complaint challenging the decision to dismiss him with immediate effect for misconduct because of his unauthorized absence from work on 17 May 2013. He seeks an order setting aside that decision and asks that he be reinstated on a Regular Programme post with effect from 17 August 2013.

2. In arriving at the conclusion that the complainant's second complaint should be dismissed, the Tribunal found as follows, in consideration 17:

“On the face of it, there may appear to be no falsity in the complainant's e-mail statement to his supervisor at 11:58 on the morning of 17 May 2013

that he was 'not feeling well and got some medicine' as '[a]pparently, [he] ha[d] caught a flu' and 'will go home earlier [...] to recover'. However, the surrounding circumstances suggest otherwise. The statement that he apparently caught the flu was not in affirmative terms. The complainant provides no evidence that he did. He had sent the foregoing statement having had the earlier exchange of messages at 8:27 and 9:08 on that morning with the Chief of the Security Services Division (CSDU), his supervisor. In the last message the Chief of CSDU, who had returned from mission, had indicated that he would try to come into the office later that day. He was scheduled to be out of the office from 11 to 20 May 2013. During that period the complainant was designated as OIC for CSDU/Field Security. The complainant had purchased a motor vehicle in Sicily and was there to sign for the transfer of ownership on 17 May 2013. The complainant subsequently accepted that he was in Sicily, but provides an airline ticket showing his return flight from Sicily to Rome was scheduled for 7:10 on the morning of 17 May 2013 to arrive in Rome at 8:25 that morning. This, however, is not evidence of the time of his actual travel.

The complainant had left the office in Rome at 5:15 on the afternoon of 16 May 2013. He provided a doctor's note and a visitor's chart to confirm that he was absent from work on 17 May 2013 for a valid medical reason. The FAO doubts the authenticity of these documents on the grounds that they do not show who prepared the information entered therein; they seem to have been issued by the office of an orthodontist for pain in the temporomandibular joint; they do not show whether the information therein relates to the complainant; they do not show whether they were prepared on or refer to a medical consultation on 17 May 2013 and they do not contain information confirming that the complainant had caught the flu. These circumstances caused the FAO to conclude that the statement which he made concerning his illness on the subject day was not genuine or authentic and that, while the complainant did not actually state that he was in the office and was leaving earlier to go home to recover, the statement was worded to convey that impression. In these circumstances, the Tribunal finds that the FAO could properly have concluded, as it did, that the subject statements which the complainant made were false."

The Tribunal held that the FAO did not err in finding that there was evidence establishing beyond a reasonable doubt that the complainant's conduct was unsatisfactory and that it amounted to misconduct for which a disciplinary measure could have been imposed; that his dismissal as a disciplinary measure was not disproportionate and that he had not substantiated his allegations of abuse of authority; discriminatory and unequal treatment; that he was harassed and mobbed or that he was dismissed without the observance of due process.

3. It should be recalled that a judgment of the Tribunal may be reviewed only in exceptional circumstances and on strictly limited grounds. The rationale for this was stated, for example, in Judgment 3815, consideration 4, as follows:

“Consistent precedent has it that, pursuant to Article VI of its Statute, the Tribunal’s judgments are ‘final and without appeal’ and have *res judicata* authority. They may therefore be reviewed only in exceptional circumstances and on strictly limited grounds. As stated, for example, in Judgments 1178, 1507, 2059, 2158 and 2736, the only admissible grounds for review are failure to take account of material facts, a material error involving no exercise of judgement, an omission to rule on a claim, or the discovery of new facts which the complainant was unable to rely on in the original proceedings. Moreover, these pleas must be likely to have a bearing on the outcome of the case. Pleas of a mistake of law, failure to admit evidence, misinterpretation of the facts or omission to rule on a plea, on the other hand, afford no grounds for review (see, for example, Judgments 3001, under 2, 3452, under 2, and 3473, under 3).”

The recent explicit recognition in the Tribunal’s Statute of the right to apply for a review has not altered the limits established in the Tribunal’s case law on the grounds on which such applications can be admitted.

4. The complainant states, as his first ground of review, that the Tribunal omitted to take into account an essential fact, namely that he was absent for a valid medical reason. He submits two documents (the doctor’s note and visitor’s chart), which were already provided in the context of his second complaint and which are discussed in the extract quoted above. In addition, he submits a letter from his doctor declaring that he paid her a visit in the morning of 17 May 2013. In the complainant’s view, these documents show that his absence fully qualified for uncertified sick leave under Manual paragraph 323.3.1, and that his request for uncertified sick leave was genuine. However, the Tribunal notes this letter was evidence which could have been filed with his second complaint.

In his second ground, the complainant states that Judgment 3882 breaches his fundamental social right to sick leave and his human right to health.

5. It is determined that the grounds of review proffered by the complainant do not come within the limited grounds for reviewing a judgment as, essentially, he merely disagrees with the Tribunal's interpretation of the facts and argues that it committed a mistake of law, neither of which constitute grounds for review under the Tribunal's case law (see Judgment 3478, considerations 3, 4 and 6, Judgment 1529, considerations 7 and 8, and the case law cited therein).

6. It follows that the present application for review is clearly irreceivable. It will therefore be summarily dismissed under Article 7 of the Tribunal's Rules.

DECISION

For the above reasons,
The application for review is dismissed.

In witness of this judgment, adopted on 24 October 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ