

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

A.
v.
FAO

129th Session

Judgment No. 4226

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr K. A. against the Food and Agriculture Organization of the United Nations (FAO) on 2 March 2018, the FAO's reply of 25 June, the complainant's rejoinder of 13 August and the FAO's surrejoinder of 28 November 2018;

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 to dismiss him for misconduct.

The complainant is a former staff member of the World Food Programme (WFP) – an autonomous joint subsidiary programme of the United Nations and the FAO. At the material time, he was serving as Deputy Country Director in WFP's Country Office in the Democratic Republic of the Congo. In August 2013 the Office of Inspections and Investigations (OIGI) initiated a preliminary investigation into allegations of misconduct against the complainant. OIGI concluded that there was a legitimate basis to warrant a full investigation.

On 17 July 2014 the complainant was interviewed by OIGI. In its report of 30 September 2014 OIGI found that the complainant had engaged in misconduct in that he had violated the WFP procurement rules, that he had used his official position for the benefit of a private company owned by a friend and that he had engaged in fraudulent misrepresentation and actions giving rise to a conflict of interest. Based on its findings and conclusions, OIGI recommended that appropriate administrative or disciplinary actions be taken against the complainant.

On 6 March 2015 the complainant was informed by the Director of the Human Resources Division (HR) that on the basis of the findings of OIGI, disciplinary proceedings were being initiated against him. Having regard to the proposed disciplinary measure, the Director of HR concluded that, if confirmed, his conduct warranted a “severe response” pursuant to WFP’s policy of zero tolerance for fraud, corruption and collusive practices. On 28 April the complainant submitted his response, denying the charges made against him.

On 15 October 2015 the Director of HR informed him that WFP had decided to apply to him the sanction of dismissal, with compensation in lieu of notice and without termination indemnities, on the grounds that the evidence was sufficient to confirm the charges and that there were several aggravating factors, including that the complainant held a senior position, that the misconduct had occurred in the context of procurement activities where the perception of preferential treatment may harm the image of the organization and that the complainant had placed outside interests above those of WFP. As a result, he was separated on 22 October 2015.

On 13 January 2016 the complainant lodged an appeal with the WFP Executive Director challenging that decision. As his appeal was rejected on 14 March 2016, the complainant appealed before the FAO Appeals Committee on 3 May 2016.

On 2 March 2018 the complainant filed the present complaint impugning the decision of 15 October 2015.

In its report of 19 June 2018 the Appeals Committee, which held a hearing with the complainant, recommended that the appeal be dismissed in its entirety. By a letter dated 22 June 2018 the complainant was

informed that the FAO Director-General concurred with the Appeals Committee's findings and recommendation and that he had decided to dismiss his appeal in its entirety. That is the decision the complainant impugns in his second complaint.

The complainant asks the Tribunal to quash the decision of 15 October 2015 and to award him moral damages, as well as costs.

In his rejoinder, he acknowledges the issuance of a final decision after the filing of his complaint, but he asks the Tribunal to disregard the Appeals Committee's report and the final decision, on the grounds that there was unacceptable delay and that only being able to comment on them in his rejoinder amounts to a violation of due process.

The FAO submits that the present complaint is irreceivable, because the requirements for a direct appeal to the Tribunal were not met. It has no objection to the Tribunal allowing the complainant to challenge the decision of 22 June 2018 for purposes of procedural expediency and that the Tribunal's judgment be "accorded *res judicata* effect". On the merits, the FAO asks the Tribunal to dismiss the complaint as entirely unfounded.

CONSIDERATIONS

1. The complainant's employment with WFP was terminated in October 2015 as a result of negative findings against him in disciplinary proceedings initiated earlier that year. He unsuccessfully appealed to the WFP Executive Director and, on 3 May 2016, lodged an appeal with the FAO Appeals Committee. At the time he filed his first complaint with the Tribunal on 2 March 2018, the Appeals Committee had not finalised its consideration of the appeal. It did so subsequently in a report dated 19 June 2018 recommending the dismissal of the appeal. The ensuing decision of the FAO Director-General of 22 June 2018 to dismiss the appeal is the subject of a second complaint filed on 19 September 2018.

2. In its reply dated 25 June 2018, the FAO adopts a position concerning the receivability of the first complaint, which has three elements. Firstly it contends the first complaint is irreceivable because

the complainant had not, at the time the first complaint was filed, exhausted internal means of redress. Secondly and notwithstanding the irreceivability of the first complaint, it does not wish to stand in the way of the first complaint being a vehicle for the Tribunal to determine, on the merits, the complainant's grievance concerning his dismissal. Thirdly it asks that any determination of the Tribunal in relation to the first complaint should be "accorded *res judicata* effect".

3. The complainant anticipated the argument that the complaint was irreceivable in his brief and advanced reasons why it was receivable. He adheres to this position in his rejoinder. Thus there is a threshold issue that needs to be resolved before the Tribunal is competent in relation to this complaint.

4. Article VII, paragraph 1, of the Tribunal's Statute is clear in its terms. It provides that "[a] complaint shall not be receivable unless [...] the person concerned has exhausted such other means of redress as are open to her or him under the applicable Staff Regulations". Article VII, paragraph 1, is satisfied when the complainant's internal appeal has been paralysed (see, for example, Judgments 3685, consideration 6, 3302, consideration 4, and 2939, consideration 9) and the complainant has done her or his utmost to have the internal appeal resolved (see, for example, Judgments 2039, consideration 4, and 1674, consideration 6(b)). This case law simply identifies circumstances where the complainant can be treated as having exhausted internal means of redress, thus satisfying the provisions of the Article notwithstanding that, as a matter of fact, either an internal appeal body has not addressed the appeal or the executive head of the organisation has not done so at the time the complaint was filed with the Tribunal.

5. While no doubt influenced by worthwhile practical considerations, the FAO's position on the second and third elements referred to in consideration 2 above must be rejected. Having raised the point that the complaint is irreceivable, its consent to the matter proceeding to determination on its merits is irrelevant if, as revealed shortly, the complaint is irreceivable by operation of the Statute.

Moreover, the status of a judgment as operating *res judicata* does not depend on the opinion expressed by the Tribunal in that judgment. Rather it depends on the nature of the judgment itself, the orders made and the application of the case law concerning *res judicata*.

6. Whether the first complaint is irreceivable is to be determined by reference to narrowly focused facts and the application of the case law referred to in consideration 4 above.

7. It is to be recalled that the internal appeal began with the complainant lodging the appeal before the FAO Appeals Committee on 3 May 2016. The pleadings closed on 3 October 2016. In February 2017, the complainant wrote to the Appeals Committee Secretariat asking when his appeal would be heard and he did so again in June 2017. His final communication with the Appeals Committee before filing his complaint with the Tribunal on 2 March 2018 was an exchange of e-mails on 18 July 2017. The complainant asked when his case would be heard and asked for a copy of the rules concerning the convening of the Appeals Committee and “anything to do with [the] period within which an appeal should be heard”. In her reply, the Staff Assistant responding on behalf of the Appeals Committee firstly apologised for the delay in responding to, the Tribunal infers, an e-mail of 16 June 2017. She then repeated an explanation she had given to the complainant in June when they met, that the workload of the Secretariat of the Appeals Committee had intensified and that they were unable to confirm a hearing date. She went on to state: “we are working hard to rectify this matter and as soon as a date has been identified and confirmed, you will be informed immediately”.

8. It is difficult to say, in the face of this correspondence, that the complainant’s internal appeal had been paralysed. It is true that the appeal remained unaddressed by the Appeals Committee for a very long time though, in fact, a notice of hearing was issued on 4 April 2018 advising the complainant that the hearing would be held on 8 May 2018, which was later rescheduled to 22 May 2018 when it actually occurred. But the complainant was being told that his appeal would be heard and

efforts were being made to ensure that that would happen. The appeal process was not paralysed and the complainant had not exhausted internal means of redress when he filed his complaint with the Tribunal. By operation of Article VII, paragraph 1, his first complaint is irreceivable and should be dismissed.

9. In the circumstances, there will be no joinder of the present complaint with the complainant's second complaint.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 November 2019, Mr Patrick Frydman, President of the Tribunal, Ms Dolores M. Hansen, Vice-President, Mr Giuseppe Barbagallo, Judge, Mr Michael F. Moore, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

PATRICK FRYDMAN

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

YVES KREINS

DRAŽEN PETROVIĆ