

The Administrative Tribunal,

Considering the second complaint filed by Mrs E. B. against the Food and Agriculture Organization of the United Nations (FAO) on 19 July 2002 and corrected on 5 August, the FAO's reply of 23 October, the complainant's rejoinder of 4 December 2002 and the Organization's surrejoinder of 13 February 2003;

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. Facts relating to the complainant's career at the FAO are set out under A in Judgment 1953 on her first case. On 1 January 2000 she held grade G.5 and was assigned to the post of Personnel Clerk in the Management Support Service of the Administration and Finance Department.

An anti-theft device sounded as the complainant was leaving the FAO Commissary's salesroom on 7 July 2000. She was found to have a cosmetic lotion, valued at 92,500 Italian lire, in her handbag. There was an anti-theft label on the bottle itself but not on the outer box. The complainant said she had purchased it the previous day and would look for the receipt at home. She was unable to produce it. On 13 July the Officer-in-Charge of the Commissary produced a report on the incident, saying that an internal check carried out on 10 July had shown that no purchase had been made by the complainant on 6 July. It was sent to the Personnel Division on 14 July. The complainant was informed on 17 July that an inventory check had revealed that one of the lotions was missing.

On 21 July the Director of the Personnel Division forwarded the report of 13 July to the complainant and asked her to provide a written explanation in response to the allegation of attempted theft made against her. The complainant responded on 27 July. By a memorandum of 27 September the Director of the Administrative Services Division notified the complainant of the Organization's intention to impose on her the disciplinary measure of dismissal. The complainant submitted further written comments on 9 October. On 26 October the Director of the Personnel Division informed her that the disciplinary measure had been commuted to demotion to grade G.4 as from 1 November with a concomitant transfer to another post. She was transferred to the Policy and Planning Service of the Personnel Division. On 8 November 2000 she learned that her commissary privileges which had been withdrawn on 13 July would remain blocked.

By a letter of 24 January 2001 the complainant lodged an appeal with the Director-General against the decision of 26 October. The Assistant Director-General in charge of the Administration and Finance Department dismissed her appeal on 12 March. Following a request he made on 29 March, the complainant's counsel was sent copies of the relevant computer printouts produced by the Commissary. On 12 April the complainant appealed to the Appeals Committee. In its report of 18 December 2001 the Committee found partly in her favour. By a decision of 9 May 2002 the Director-General rejected her appeal. That is the impugned decision.

B. The complainant claims that she did not commit the theft she is accused of. Her main pleas are as follows. First, the Organization has the responsibility of proving its allegation with clear evidence, and it has not satisfied the burden of proof. The activation of the alarm system *per se* does not establish whether the item was paid for or not, and her inability to find the receipt for the lotion in question cannot be regarded as evidence of guilt. She questions the reliability of the computerised inventory check particularly as it was conducted ten days after the incident.

Secondly, even taking the hypothesis that theft had occurred, the principle of proportionality was not respected. The sanctions in her case were both excessive and unreasonable, consisting of: demotion, transfer and confiscation of

commissary privileges. They resulted in non-assignment of duties; she was treated as a "non-person" and was compelled to solicit work assignments. The Organization, she alleges, clearly intended causing her loss of dignity in the hope that she would submit her resignation. By transferring her to a new post without functions it intended to cause her emotional distress. In her opinion it was unnecessary to add transfer to the sanction of demotion since there were two vacant clerical posts at grade G.4 in her unit. The FAO denied her a proper working environment, and the "triple punishment" affected her health.

The complainant seeks: reinstatement in her previous grade from 1 November 2000 and payment of the amount due in back pay and allowances on the basis of grade G.5 from that date; payment by the Organization of the difference due in pension fund contributions; reassignment to her former unit, post and duties; restitution of her commissary card; an award of damages; and costs.

C. The Organization replies that the complainant was found guilty of attempted theft and her action constituted unsatisfactory conduct. The measures it subsequently took were fully justified and it acted in conformity with the Staff Regulations and Rules.

It maintains that the facts establishing the complainant's guilt are conclusive. Since she could not prove that she had purchased the lotion on 6 July it obtained computerised records from the Commissary to check her explanation. It became clear that no products from the range at issue were sold on 6 July; that she herself had bought nothing that day; that there was to be a special promotion of the lotion in question on 7 July and each item had been marked up with anti-theft labels on the morning of the 7th; and the inventory showed that out of 112 items only 111 were in stock. The FAO asserts that the date when the inventory check was conducted is irrelevant. The computerised records show beyond any doubt that she did not purchase the lotion, and she has not provided any substantive evidence to rebut the clear evidence put forward by the Organization.

The FAO holds the view that the disciplinary measure was proportionate to her unsatisfactory conduct. It does not share the complainant's view that she had a "triple punishment". Dismissal was commuted to demotion. The latter was effected through a concomitant transfer. The transfer, which was a discretionary decision, took place for organisational reasons. The FAO contends that the withdrawal of commissary privileges in case of abuse is allowed under paragraph 4.4 of Appendix D of Manual Section 103, and given that there was attempted theft such confiscation was justified.

In addition, it says that the health matters that the complainant refers to are unfortunate but they cannot be considered attributable to the Organization.

D. In her rejoinder the complainant questions the value of the evidence that was put forward by the Organization.

She presses her argument that three sanctions were imposed on her for one alleged offence. In transferring her to a post with no functions the Organization acted vindictively. The nature of the transfer rendered it a further sanction in addition to demotion.

Moreover, the withdrawal of commissary privileges constituted a third sanction, and yet erroneously so, as she submits that paragraph 4.4 of Appendix D of Manual section 103 allows for such withdrawal only in the event of excessive purchasing.

E. In its surrejoinder the Organization disagrees with the complainant's interpretation of paragraph 4.4 and maintains its view that attempted theft constituted serious abuse warranting the measure taken.

It lists the functions of the G.4 post that the complainant was transferred to and denies that she was not assigned any duties.

CONSIDERATIONS

1. The complainant was accused of attempting to steal a cosmetic lotion from the FAO Commissary's salesroom on 7 July 2000. (The product's value was 92,500 Italian lire, or approximately 45 United States dollars). As a result, she was demoted from G.5 to G.4, transferred, and had her commissary privileges revoked although it had originally been proposed to dismiss her. She asserts that she had purchased the item the previous day, having paid

cash, and that she did not keep the sales receipt. She submits that the FAO subjected her to these disciplinary measures without proof that she indeed took the item in question. She argues that the disciplinary sanction violates the principle of proportionality and has caused her moral and emotional injury.

2. In its recommendation the Appeals Committee stated that it:

"1) rejects the appellant's request to reactivate her Commissary privileges but notes that those privileges are only suspended and not definitively cancelled;

2) rejects the appellant's pleas against her transfer;

3) assuming the guilt, is of the opinion that the demotion from grade G-5 to grade G-4 is not commensurate with the gravity of the act and, in view of the good working records of the appellant, supported an independent review of any potential application of the appellant to G-5 vacancies open in the Organization;

4) notes the appellant has not admitted committing the theft and that the Organization has not conclusively proven her guilt."

3. In rejecting the complainant's appeal the Director-General said:

"I wish to inform you that a careful review of your case has led me to disagree, for the reasons explained below, with most of the conclusions and recommendations made by the Appeals Committee.

Firstly, I do not share the finding made by the Committee that 'the Organization has not conclusively proven [your] guilt'. I consider, on the contrary, that the record filed with the Appeals Committee established that:

i. on Friday 7 July 2000, at 17:15 hours, the anti-theft device was activated when you passed through it. The Salesroom Coordinator looked into your handbag and found a cosmetic product costing [92,500 lire] which had been part of a special display in the Commissary Perfumery on that day. The anti-theft label affixed to the carton had been removed, whereas a similar label on the bottle inside the carton had remained intact;

ii. your immediate explanation during the event was that you had purchased the product on the previous day, Thursday 6 July 2000, and you undertook to bring the sales receipt to the Salesroom Coordinator on the following Monday, which you were never able to do;

iii. your explanation, which you have reiterated throughout the proceedings has proved to be false, based on computerized records showing that: a) no such lotion from the [range in question] was sold on 6 July 2000; b) you did not buy anything from the Commissary on 6 July 2000; and c) the specific item found in your handbag bore an anti-theft label on the bottle that had been applied on all similar items on the morning of Friday 7 July 2000, in preparation for a special promotion of this product in the Perfumery on that day; and

iv. an inventory of that product performed on 17 July 2000 showed that instead of the computerized inventory of 112 items, only 111 were found in stock.

[...]

On the question of proportionality, I noted that the Organization had stressed that the proposed dismissal for misconduct had been commuted to demotion in view of your record of satisfactory service. It was also pointed out that this decision constituted an exceptional opportunity for you to remain in remunerated employment. It is considered that theft constitutes an egregious lapse in the integrity and loyalty to the Organization expected of an international civil servant, as specified under paragraph 4 of the Report on Standards of Conduct prepared by the International Civil Service Advisory Board (Manual Section 304 refers), stating that the 'fundamental, if not paramount, standard of conduct derives from the requirement of integrity'. I noted that the Organization had invoked, in that respect, precedents from the International Labour Organization Administrative Tribunal which supported its position. In [Judgment 1925] the Tribunal upheld a decision taken by the Director-General of IAEA to summarily dismiss a staff member who had stolen property belonging to the Agency, on the grounds, *inter alia*, that "There can be no doubt that theft by an official of an international organisation of goods belonging to that organisation constitutes serious misconduct which may warrant summary dismissal'."

4. That is the impugned decision.

5. The evidence of the complainant's guilt is as described in the impugned decision. The Appeals Committee seems to have been of the view that this evidence was not sufficient because it was purely circumstantial. That was clearly an error of law. The evidence of her guilt was direct and damning: she was caught red-handed with goods she had not paid for. The circumstantial evidence was what was presented by the Organization to refute her defence that she had bought and paid for the item the day before. Those circumstances point convincingly to guilt and there is no credible innocent explanation for them. Further, the explanation offered by the complainant is implausible to a degree and is simply incompatible with the circumstances put in evidence by the Organization.

6. As far as concerns the proportionality of the penalty imposed, the case law of the Tribunal cited in the impugned decision supports even the penalty of dismissal for the offence of theft. Likewise, in Judgment 1828, the complainant was dismissed for having submitted a fraudulent travel expenses claim. The Tribunal dismissed the complaint and held that:

"Even though the amount at stake was not large, an intent to defraud the Organization is a most serious offence. The Organization may expect the highest standards of integrity from its staff; it could not possibly just overlook the fraud; and there was nothing disproportionate about dismissing [the complainant] for the misconduct she had committed."

7. The demotion imposed on the complainant, with its accompanying transfer and the loss of commissary privileges, was not disproportionate. Her allegation that she is currently not given any work to do is devoid of any supporting detail.

8. The complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet