

106th Session

Judgment No. 2771

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Y. G. against the Food and Agriculture Organization of the United Nations (FAO) on 12 November 2007 and corrected on 21 December 2007, the FAO's reply of 23 April 2008, the complainant's rejoinder dated 26 June and the Organization's surrejoinder of 26 September 2008;

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, an Ethiopian national born in 1948, was Chief of the FAO's Technical Cooperation Programme Service at grade D-1 from 2001 to 2007. On 1 April 2004 he was notified that one of his subordinates had submitted an internal complaint, invoking Administrative Circular No. 2003/17 of 26 June 2003, which sets out the "Policy on Prevention of Harassment", and alleging harassment and sexual harassment on his part. She claimed in particular that, during a mission in Latin America in November 2003, the complainant had complimented her on her clothing and physical appearance and that he had invited her to join him in his room for a drink. She also

alleged that he had publicly berated her and that he had tried to embrace and kiss her. In addition, she claimed that since 2002 the complainant had adopted a hostile and aggressive attitude towards her, resisting her requests for annual leave and teleworking, and unexpectedly reassigning her country responsibilities in March 2004.

The complainant denied these allegations and suggested that the informal mediation procedure set out in the above-mentioned administrative circular be initiated to resolve the matter. This suggestion having been rejected by the subordinate, a formal approach was pursued and the harassment complaint was referred to the Investigation Panel in accordance with Part II(b) of the Administrative Circular. In its report issued on 16 September 2004, the Panel concluded, on the basis of oral and written evidence, that the complainant's comments, invitations and attempt to embrace and kiss his subordinate during the mission to Latin America constituted sexual harassment. It also found that he had harassed his subordinate by shouting at her in front of others in a hotel lobby, which constituted a "degrading public tirade by a supervisor" within the meaning of Administrative Circular No. 2003/17. Lastly, the Panel considered that "some degree of harassment" had taken place in connection with the reassignment of the subordinate's country responsibilities, particularly because of her "continual exclusion from normal communication".

On 1 October 2004 the Director of the Human Resources Management Division requested the Investigation Panel to provide a copy of the evidence supporting its factual findings. The Panel consequently prepared a three-page addendum to its report, which summarised the supporting evidence. On 22 and 23 November the Secretary of the Panel sent to five witnesses, who had been interviewed by the Panel, a summary of their respective testimony, and informed them that the summaries would be communicated to the parties. Four of these witnesses amended their testimony. In a memorandum of 30 November 2004 the Panel considered that the amendments did not lead it to modify its conclusions.

In the meantime, on 22 November, the subordinate had written to the Assistant Director-General in charge of the Administration and

Finance Department, and Officer-in-Charge of the Human Resources Management Division (hereinafter “the Assistant Director-General”), seeking to adduce additional evidence from a person who had formerly worked for the FAO, though not in the same service as the complainant. Based on this additional evidence and on the evidence that the Investigation Panel had collected, the Assistant Director-General concluded that the complainant’s conduct constituted unsatisfactory conduct as defined in the FAO Administrative Manual and violated the Staff Regulations. As a result, a disciplinary measure of demotion to grade P-5 would be proposed. He informed the complainant accordingly in a memorandum of 17 December 2004, giving him five working days to reply. The complainant responded on 24 January 2005, arguing that the charges were unsubstantiated and requesting that the measure of demotion be reconsidered and withdrawn.

After having met with the complainant, the Assistant Director-General informed him that it had been decided to suspend the measure of demotion and to request that the Panel initiate a further investigation in order to collect supplementary evidence supporting its findings. During April and May 2005 the Panel gathered further evidence and on 15 June it issued a memorandum in which it stated that it upheld its initial conclusions. The complainant responded on 7 September 2005, again denying the charges and requesting that the measure of demotion be withdrawn. On 6 February 2006 the Director of the Human Resources Management Division informed him that the charges of harassment and sexual harassment were considered substantiated and that it had been decided to impose on him a measure of suspension without pay for a period of two months with effect from 13 February and to transfer him to a post outside the Technical Cooperation Programme Service.

The complainant lodged an appeal with the Director-General against the sanctions on 24 February 2006. He was informed on 10 April that his appeal had been rejected. He thus lodged an appeal with the Appeals Committee, which delivered its report to the Director-General on 4 March 2007. The Committee considered that the finding of harassment in connection with the reassignment of the

subordinate's country responsibilities was mistaken and recommended that the appeal be allowed on this issue. However, it recommended that the appeal be rejected as regards the other two charges of harassment and it deemed that the penalty against the complainant was proportionate to these two charges. By a letter of 30 July 2007 the Director-General advised the complainant that he had decided to endorse the Appeals Committee's recommendations only in part and to reject the recommendation in connection with the reassignment of country responsibilities. He therefore dismissed the appeal in its entirety. That is the impugned decision.

B. The complainant submits that the internal investigation was conducted in breach of due process and particularly in breach of the principle of adversarial proceedings. Firstly, he was not allowed to be present during interviews of witnesses, nor was he allowed to cross-examine them. Secondly, he was not provided with a verbatim record of the interviews but mere handwritten, incomplete notes and summaries which, as pointed out by the witnesses themselves in November 2004, contained inconsistencies. Thirdly, he was not given an opportunity to challenge evidence, particularly the additional evidence, before it was used against him. Fourthly, he was given unreasonably short deadlines to respond to the Organization.

The complainant also submits that the procedure set out in Administrative Circular No. 2003/17 was not correctly followed, as it is unclear whether all three members of the Investigation Panel actually took part in the preparation of its report. He notes that one of the Panel members was on maternity leave when the addendum was prepared and that, out of the two available members, one signed, on behalf of another member, the addendum as well as the memoranda of 30 November 2004 and of 15 June 2005.

He argues that the charges brought against him are unsubstantiated and the Organization failed to investigate the truth of the charges, as required by the Tribunal's case law. From the

beginning of its inquiry, he says, the Panel had formed the view that he was guilty, in breach of the presumption of innocence. In using the testimony of a person who had never worked with the complainant, it manufactured evidence. It also misinterpreted evidence, assigning only limited significance to the testimonies which had been amended. As to the harassment charge based on the reassignment of the subordinate's country responsibilities, the complainant emphasises that he had consulted with his superiors prior to deciding the reassignment, which was based on rational and legitimate reasons and applied to all staff members working in the Technical Cooperation Programme Service; the charge is therefore without merit.

By way of relief, the complainant seeks the setting aside of the impugned decision and his reinstatement in a post equivalent to his D-1 post. He asks the Tribunal to order the FAO to pay the salary and emoluments withheld during the two-month suspension, together with interest as from 1 March 2006. He claims moral damages in the amount of 580,000 euros. He also claims legal costs in the amount of 61,771 euros, to which he adds 210 euros in administrative costs.

C. In its reply the FAO argues that there was no breach of due process. According to the Organization, the Investigation Panel is an administrative body, whose role is limited to fact-finding as reflected in Administrative Circular No. 2003/17. It does not decide to impose sanctions, nor does it make recommendations in this respect; it is therefore not required to carry out its investigation in a strictly adversarial manner. The Organization contends that the right to cross-examine witnesses only applies at the judiciary stage, once the charges are formulated, and that it cannot always be granted in harassment cases due to the sensitive nature of such cases. It also contends that the case law does not recognise a right to attend interviews of witnesses. In the present case, the complainant was duly informed about the evidence against him; his rights were not affected by the absence of a verbatim record and he was free to arrange for interviews of witnesses. He thus had the opportunity, which he used, to challenge evidence, including the additional evidence.

With respect to the composition of the Panel, the Organization submits that it is not necessary for all members to be present in all of its proceedings. It points out that in the only instance when one of the Panel members could not be reached, the Panel merely recalled its discussions.

The FAO maintains that the charges brought against the complainant are supported by ample evidence, which the Panel duly reviewed and appropriately weighed in the circumstances of the case. The additional evidence showed a pattern of behaviour consistent with the subordinate's allegations. The Organization rejects the contention that the Panel's finding of guilt was a foregone conclusion. The complainant's superior was not consulted prior to the reassignment of the subordinate's country responsibilities, a measure which, in the view of the FAO, was questionable from a managerial point of view and did not amount to a "matter of routine".

D. In his rejoinder the complainant presses his pleas. He states that, insofar as the Investigation Panel reviewed and weighed evidence and facts, it clearly performed judicial functions and therefore it should have respected his due process rights, including his right to cross-examine witnesses. He adds that, contrary to the terms of Administrative Circular No. 2007/05, which in 2007 amended the Policy on Prevention of Harassment, he was not provided with an opportunity to comment on the Panel's report before the Assistant Director-General decided to impose a disciplinary measure on him. Further, his presence during the interviews of witnesses would have ensured that the testimonies were properly recorded. The Organization failed to establish rules or procedures for the admission of evidence, and the Panel's investigation created an impression of partiality. The complainant also points out that, a few months after the subordinate submitted her harassment complaint, she initiated internal proceedings against the FAO based on the same facts. To the extent that these proceedings had been dismissed, he contends that they were relevant to the instant case and that, in refusing to provide documents relating to them, the Organization further breached his rights to due process. He submits that the Panel erroneously disregarded certain testimonies and

considered hearsay evidence as admissible and that the Assistant Director-General improperly relied on inadmissible and irrelevant additional evidence.

E. In its surrejoinder the Organization reiterates its position in full. It emphasises that the complainant decided to reassign the subordinate's country responsibilities with the intent to harm her and that such measure affected her more than any of the other staff members working in the Technical Cooperation Programme Service.

CONSIDERATIONS

1. On 6 February 2006 the complainant was informed that the charges of harassment and sexual harassment levelled against him by one of his subordinates were considered substantiated. He was suspended without pay for a period of two months and assigned to a post outside the Technical Cooperation Programme Service in which he and his subordinate had worked. He filed an appeal with the Appeals Committee, which, in its report of 4 March 2007, found that one of the three charges of harassment made against him had not been substantiated, but that the penalty imposed was proportionate to the other two. In the result, it recommended that the finding of harassment in relation to that one charge be retracted but that in all other respects the appeal be rejected. By a letter of 30 July 2007 the Director-General rejected the recommendation of the Committee in relation to the charge it found unsubstantiated but accepted its other recommendations. That is the impugned decision which the complainant seeks to have set aside, as well as to be granted consequential relief.

2. The first two charges of harassment upon which the finding of unsatisfactory conduct was based related to events which, according to the subordinate, occurred during a mission which she and the complainant undertook in Latin America in November 2003. The subordinate claimed that, during the mission, the complainant began complimenting her on her clothing and physical appearance, arranged

hotel reservations so that they would have rooms on the same floor, suggested on most evenings that she join him in his room for a drink and alluded most mornings to the fact that she had slept alone. She claimed that, on 16 November 2003 in San Salvador, the complainant became agitated when he did not find her in her room, arranged for hotel staff to open her room and shouted at her in the hotel lobby in front of everyone. The second event occurred, according to the subordinate, in Honduras on 18 November 2003 when the complainant embraced and kissed her in the hallway of their hotel. The third matter related to workplace events culminating in the complainant changing the subordinate's country responsibilities in March 2004. It was this charge that the Appeals Committee found was not substantiated. It was after having been informed of the change in her country responsibilities that the subordinate lodged her harassment complaint.

3. The subordinate's complaint was referred to an Investigation Panel in accordance with the Policy on Prevention of Harassment set out in Administrative Circular No. 2003/17. The Panel found that the incident in the hotel lobby in San Salvador amounted to "a 'degrading public tirade[s] by a supervisor'" and constituted harassment. In relation to events in Honduras, it found that, "because [the complainant] made an unwelcome sexual advance and demonstrated seductive behaviour, he violated FAO's Policy on Harassment". With respect to the third matter, the Panel found that various of the matters relied upon by the complainant did not constitute harassment but, although there was "no evidence that the reallocation of countries [...] was due to improper motives [...] the 'continual exclusion [of the subordinate] from normal communication' [...] suggest[ed] that some harassment [...] took place".

4. The complainant contends that the Investigation Panel proceeded in breach of his right to due process. In this respect, he points out that he was not present when witnesses were interviewed, he was not permitted to cross-examine them, he was not given the opportunity to challenge the admissibility of documents used against

him and he was denied the right to the presumption of innocence. Further, he was denied a verbatim record of the evidence against him and, he contends, the summaries provided to him did not accurately record the evidence, their accuracy having later been disputed by the witnesses themselves. He also contends that the Panel was less deferential in its interview with him than with his subordinate. Moreover, he complains that the Assistant Director-General accepted additional evidence adduced by his subordinate which he was not able to challenge. He also contends that the evidence was insufficient to establish the charges made by his subordinate.

5. Before dealing further with the complainant's arguments, it is convenient to refer to the content of the Policy. The Policy defines "harassment" as meaning:

"any improper behaviour by an FAO staff member [...] that is directed at, and is offensive to, another individual and which that staff member knew or ought reasonably to have known would be unwelcome. It comprises objectionable conduct or comment made on either a one-time or continuous basis that demeans, belittles, or causes personal humiliation or embarrassment to an individual."

There are then set out examples of harassment, including "degrading public tirades by a supervisor or colleague". Additionally, the definition sets out what is included in the notion of "sexual harassment". It is unnecessary to refer to those examples as it is clear that, if the incident in the hallway of the hotel in Honduras occurred, it constitutes sexual harassment. However, the complainant challenges the finding in relation to the incident in San Salvador on the basis that the FAO held a single incident to constitute harassment, whereas the definition refers to "public tirades". This argument must be rejected. The definition allows that harassment may consist of a single objectionable act that demeans or causes embarrassment. The alleged incidents in the hotel lobby in San Salvador and in the hallway of the hotel in Honduras satisfy that test.

6. The Policy on Prevention of Harassment provides for the lodging of a harassment complaint with the Director of the Human Resources Management Division describing "the specific offensive act

or acts, the time, location and circumstances under which they took place, and any other information relevant to the case”. A copy of the complaint is to be provided to the alleged offender who has the right to respond in writing “within a specified time”. In the present case, the complainant was given five days, a matter about which he now complains. However, he did not then request further time and there is nothing to suggest that he was in any way prejudiced by the time limit then imposed.

7. On the basis of the information then available, the Policy requires the Director of the Human Resources Management Division to review the matter and, if appropriate, consult with the Staff Counsellor in the Medical Service. He is then to decide whether to initiate disciplinary proceedings or refer the matter to the Investigation Panel, as happened in this case. The Policy provides:

“The Panel will conduct the investigation and fact-finding which, normally, will include interviews with the complainant, the alleged offender, any witnesses and others who could be able to provide relevant information. It will assess the reliability of the source or sources of information and the evidence submitted. The work of the Panel will be conducted on a strictly confidential basis. Any breach of confidentiality will be subject to disciplinary action.”

8. The Panel is required to submit a written report of its findings to the Director of the Human Resources Management Division who, if “the facts appear to indicate that misconduct has occurred”, is to transmit the findings of the Panel to the alleged offender with a recommendation as to the proposed disciplinary action. The alleged offender has five working days within which to submit comments. In the present case, the Panel submitted its report on 16 September 2004 and, on 1 October 2004, the Director of the Human Resources Management Division requested it to provide a copy of the evidence on which its findings were based. Consequently, an addendum indicating the evidence on which the Panel had relied was sent on 9 November 2004 to the Secretary of the Panel by two of its members, the third member being on maternity leave. On 22 and 23 November, the Secretary of the Panel wrote to five witnesses whose

statements had been quoted in the addendum of 9 November, identifying those parts of their evidence that had been quoted and informing them that they would be communicated to the parties. Three of them replied correcting the summaries or explaining details of their evidence and a fourth, the complainant's secretary, submitted a lengthy reply on 24 November 2004, denying several of the statements attributed to her. In particular, she denied that she had heard "invitations to dinner, comments on dressing, hairstyle etc. of female colleagues", that she had been "the object of some attention" from the complainant, that he had "touch[ed] her hair to identify if there were any white ones" or that she had had to book a "reconciliation coffee" with staff members.

9. The two available members of the Panel considered the amendments made by the witnesses to their testimony and, in a memorandum of 30 November 2004, indicated that they did not affect the findings "either because of limited significance [...] or the actual use made [...] of the testimony". In the meantime, on 24 November, the subordinate had produced to the Assistant Director-General an e-mail from a former colleague stating that the complainant had tried to kiss her, the colleague, when she visited his office on 12 October 2004.

10. On 17 December 2004 the complainant was provided with the report of the Investigation Panel of 16 September 2004 and its addendum of 9 November 2004, together with various other documents. Additionally, he was provided with the e-mail from the former colleague. He was informed that it was considered that his actions constituted unsatisfactory conduct and that, by way of disciplinary measure, it was proposed to demote him to grade P-5. He was given five working days to reply.

11. The complainant requested further time to reply and, also, the provision of further documents. Relevant documents that had not previously been communicated were provided on 14 January 2005 and he was given until 24 January to reply. He requested additional

documents on 19 January and they were provided the same day. He made a detailed reply on 24 January, denying the events in question, criticising the evidence, pointing out that various witnesses had challenged the accuracy of their reported statements and claiming that the Panel had “embellish[ed] events [...] and stretch[ed] definitions beyond recognition”. The complainant met with the Assistant Director-General in February 2005 when, it would seem, he reiterated his various criticisms of the evidence and the findings made against him. As a result, it was decided that the Panel should review some of its findings.

12. On 30 March 2005 the Assistant Director-General wrote to the Panel detailing the various issues and criticisms raised by the complainant in his reply of 24 January and asked it, amongst other things, to provide further evidence, if any, that it had on certain matters and to advise, in the light of the latter, whether it maintained the conclusions made in its report of 16 September and its addendum of 9 November 2004. The Panel issued a memorandum on 15 June 2005, setting out the results of its further inquiries and stating that it saw “no reason to modify the conclusions reached in its initial report”.

13. The Panel’s memorandum of 15 June was provided to the complainant on 14 July 2005 and, again, he was asked to provide his comments within a time limit, which was extended. The complainant provided his detailed reply on 7 September 2005. He again denied the acts in question and criticised the evidence and the fact-finding process adopted by the Panel. His reply was considered and, on 6 February 2006, the Director of the Human Resources Management Division wrote to him answering his criticisms, advising that it had been concluded that the charges of harassment were substantiated and imposing on the complainant a measure of suspension without pay for a period of two months and his transfer to a post outside the Technical Cooperation Programme Service.

14. In support of his argument that he was denied due process by the Panel the complainant relies on Judgment 2254 where it was said

that, “before deciding a disciplinary sanction, an organisation should inform the person concerned that disciplinary proceedings have been initiated and should allow him ample opportunity to take part in adversarial proceedings, in the course of which he is given the opportunity to express his point of view, put forward evidence and participate in the processing of the evidence submitted in support of the charges against him”. That statement relates to the situation where disciplinary proceedings have been initiated. However, and as its name suggests, the function of the Panel was to investigate. Contrary to the arguments of the complainant, the requirement that it “assess the reliability of the source or sources of information and the evidence submitted” does not render it a judicial body. The assessment of the reliability of evidence is a function that is properly described as “judicial” only when reposed in a judicial body.

15. The general requirement with respect to due process in relation to an investigation – that being the function performed by the Investigation Panel in this case – is as set out in Judgment 2475, namely, that the “investigation be conducted in a manner designed to ascertain all relevant facts without compromising the good name of the employee and that the employee be given an opportunity to test the evidence put against him or her and to answer the charge made”. At least that is so where no procedure is prescribed. Where, as here, there is a prescribed procedure, that procedure must be observed. Additionally, it is necessary that there be a fair investigation, in the sense described in Judgment 2475, and that there be an opportunity to answer the evidence and the charges.

16. Leaving aside, for the moment, the question whether the Investigation Panel was properly constituted at all times, the procedures prescribed by the Policy on Prevention of Harassment were observed. In this regard, there is no basis for reading into the power to conduct interviews the right of an alleged offender to be present during those interviews and to cross-examine the witnesses. Over and above the requirements specified in the Policy, the Panel took account of the matters of concern to the Director of the Human Resources

Management Division, as set out in the request of 1 October 2004, and the arguments and criticisms raised by the complainant and transmitted to it by the Assistant Director-General on 30 March 2005. In these respects, the Panel did more than it was obliged to do by the Policy and, arguably, the complainant thereby received an advantage. Thus and so far as is relevant to the arguments advanced by the complainant, the only issues are whether the investigation was conducted in a manner designed to ascertain all relevant facts, whether he was given an opportunity to test the evidence against him and to answer the charges against him.

17. Contrary to the arguments advanced by the complainant, there is nothing to suggest that the Investigation Panel failed to obtain, refused to accept or ignored relevant evidence, took account of irrelevant evidence or misconstrued the evidence upon which it acted. Furthermore, it may here be noted that hearsay evidence is not necessarily inadmissible. The question is always one of its probative value; and contrary to some of the submissions advanced by the complainant, there is nothing to suggest that the Panel had prejudged the issues, required him to prove his innocence or, even, treated him in a less deferential manner than it treated his subordinate. Accordingly, it must be held that the investigation conformed to the requirement that it be conducted in a manner designed to ascertain all relevant facts. Moreover, and although it is clear that only two members of the Panel were involved in the drafting of the memorandum of 30 November 2004, there is no evidence that it was other than properly constituted when it filed its initial report on 16 September 2004, that being all that was required of it under the Policy.

18. The complainant points to cases in which the Tribunal observed that the complainant had not been present when statements were taken and not given the opportunity to cross-examine witnesses (for example, Judgments 999 and 2475), to object to evidence (for example, Judgment 2468) or to have a verbatim record of the evidence (for example, Judgment 1384). These are matters that, in the cases concerned, would have ensured that the requirements of due process

were satisfied. However, they are not the only means by which due process can be ensured. In the present case, the complainant was informed of the precise allegations made against him by his subordinate, and provided with the summaries of the witnesses' testimonies relied upon by the Investigation Panel, even if not verbatim records. He was able to and did point out to the Assistant Director-General and, later, the Director of the Human Resources Management Division, inconsistencies in the evidence, its apparent weaknesses and other matters that bore upon its relevance and probative value, before the finding of unsatisfactory conduct was made on 6 February 2006. In this way, the complainant was able to confront and test the evidence against him, even though he was not present when statements were made and not able to cross-examine the witnesses who made them. Moreover, the complainant had and exercised a right of appeal to the Appeals Committee. There is no suggestion that he was in any way circumscribed in the way his appeal was conducted. Accordingly, the process, viewed in its entirety from the making of the subordinate's harassment complaint until the Committee reported to the Director-General, was one that satisfied the requirements of due process.

19. It is necessary to mention three other matters. First, the complainant contends that he was denied due process insofar as the Assistant Director-General accepted additional evidence from his subordinate which he was not able to challenge and that he failed to take into consideration the denial of several statements attributed to his secretary. The subordinate's additional evidence had no bearing on the first two charges of harassment and only indirectly on the third. For reasons that will be given later, the finding in respect of that latter charge must be set aside and, thus, nothing turns on the acceptance of the subordinate's additional evidence. So far as concerns the amendment of the statements made by the complainant's secretary, this was accepted by the Assistant Director-General and provided to the Investigation Panel for its consideration when reviewing its findings.

20. The second matter concerns the complainant's contention that "[t]here were [...] unreasonably short time periods within which

[he was] forced [...] to respond to claims”. As already indicated, he was twice granted an extension of time and there is nothing to suggest that he was prejudiced by the five days given to him to respond to his subordinate’s complaint. Thus, it cannot be concluded that these matters deprived the complainant of due process.

21. The third matter concerns what the complainant categorises as the withholding of “potentially relevant documents”. This aspect of his argument relates to the refusal of the FAO to provide him with documents lodged by his subordinate in support of subsequent internal proceedings initiated by her with respect to her removal from the Technical Cooperation Programme Service. Contrary to the complainant’s asserted belief, there is no basis for thinking that these documents have any bearing on the issues raised in his complaint.

22. The complainant also contends that the evidence was insufficient to support the charges made against him. The direct evidence in relation to the incident in the hotel lobby in San Salvador consisted of that of his subordinate and of the partner of her cousin who was present in the hotel lobby at the relevant time. The evidence of the latter is not rendered inadmissible simply because he did not provide a sworn statement. Further, the complainant conceded in his reply to the subordinate’s complaint that something had happened when he acknowledged that he “did express concern and worry when [he] was unable to find [her] for over 2 hours at the hotel in Salvador, at a time when [he] was under the impression that she was in her room”. There was, thus, sufficient evidence on which to base a finding of harassment in relation to this charge.

23. As is usual in relation to events of the kind alleged to have occurred in the hallway of the hotel in Honduras, the only direct evidence was that of the subordinate herself. The charge in relation to this matter depended on her credibility and that of the complainant. To some extent, the subordinate’s credibility was bolstered by evidence that she reported the incident to her husband in a telephone call the

next morning. That evidence, albeit that there were no independent witnesses, was sufficient to support the finding of sexual harassment.

24. As already indicated, the charge of harassment in relation to the change of the subordinate's country responsibilities is in a different category. In this respect, it is to be noted that the Investigation Panel found that there was no evidence of improper motive. Rather, it was of the view that harassment was "suggested" by "continual exclusion from normal communication". It is not entirely clear as to what was meant by that statement, but, in any event, a mere suggestion is not a sufficient basis for a finding of harassment. Furthermore, it is to be noted that the country assignments of other staff members were changed at the same time. The Panel found that the complainant did not consult with them before changing their assignments and noted that others had had changes of a similar degree to that affecting his subordinate. Additionally, the Panel noted that country reassignments took place regularly and routinely and that the subordinate, unlike other staff members, appeared to have been protected from substantial changes to her country responsibilities for many years. Contrary to what is said by the FAO, there is no evidence of improper motive or unequal treatment in the performance of what was a regular and routine management function. Accordingly, there is no basis for a finding of harassment (see Judgment 1732).

25. Although the Appeals Committee was of the view that, even if the finding of harassment in relation to the changing of the subordinate's country responsibilities were set aside, the penalty imposed would be proportionate to the other two findings, the matter must be remitted for reconsideration of the appropriate penalty. As one of the three findings of harassment must be set aside, the Director-General may well consider that a lesser penalty is appropriate, although he is not bound to do so.

26. Given the unusual circumstances of this case, the Tribunal will set aside the decision to the extent that it is based on a finding of harassment on the part of the complainant relating to the changing of

his subordinate's country responsibilities. There will be no award of costs.

DECISION

For the above reasons,

1. The Director-General's decision of 30 July 2007 is set aside to the extent only that it is based on a finding of harassment on the part of the complainant relating to the reassignment of his subordinate's country responsibilities.
2. The matter is remitted to the Director-General to consider an appropriate penalty in accordance with consideration 25.
3. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 7 November 2008, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Seydou Ba
Mary G. Gaudron
Patrick Frydman
Catherine Comtet