

**114th Session**

**Judgment No. 3184**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr A. C. against the Food and Agriculture Organization of the United Nations (FAO) on 27 July 2010, the FAO's reply of 20 December 2010, the complainant's rejoinder of 14 March 2011, corrected on 31 March, and the Organization's surrejoinder dated 15 July 2011;

Considering the fourth complaint filed by the complainant against the FAO on 23 December 2010 and corrected on 23 February 2011, the FAO's reply of 13 June, the complainant's rejoinder of 30 September 2011 and the Organization's surrejoinder dated 13 January 2012;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are to be found in Judgment 3021, delivered on 6 July 2011, concerning the complainant's first complaint. It may be recalled that he joined the FAO in June 1977 as a Guard and that he was promoted several times, attaining grade G-4 on 1 July 2004

as Assistant Security Supervisor within the Security and Transport Branch (AFSS) of the Administrative Services Division (AFS). In January 2008 he was transferred to the post of Stock Control Clerk at grade G-4 in the Infrastructure and Facilities Management Service.

On the premises of the FAO in Rome there is a duty-free shop known as the Commissary. Access to it is restricted to authorised staff holding a Commissary card. On 22 October 2007 the Director of AFS notified the complainant that he had been informed that he had entered the salesroom of the Commissary on Saturday 20 October with a friend of his who had no right of access, despite being warned not to do so by the guard. Consequently, he had decided to suspend his Commissary privileges pending receipt of his comments on the matter. The complainant, who was then on sick leave, replied on 23 October that he had gone there to do his own shopping and that he had left his friend outside the salesroom. On noticing that his friend had entered the salesroom he had immediately accompanied her outside. He added that the guard on duty had allowed his friend to enter as he had mistaken her for his wife.

By an e-mail of 29 October the Director of AFS informed the complainant that the decision to suspend his Commissary privileges was confirmed on the grounds that he had given false testimony concerning the events of 20 October. According to the Director, the video footage from surveillance cameras showed, without possible doubt, that he had exerted pressure on the guard to let his friend into the salesroom and that he had shopped with her for almost an hour. The complainant replied on 7 November, denying the accusations made against him and seeking clarification as to which procedure was being followed with regard to his alleged inappropriate behaviour.

After having viewed the videotapes, the complainant wrote to the Director of AFS on 21 November 2007 giving his own version of the facts and asking him *inter alia* to withdraw the charges against him. That same day the Director replied that the decision to suspend his Commissary privileges was confirmed. On 4 January 2008 the Chief of the Security Service wrote to the Director of the Human Resources Management Division to inform him of the events of 20 October 2007

and recommended that administrative or disciplinary action be taken against the complainant.

On 27 January 2008 the complainant submitted an appeal to the Director-General, contesting the decision to withdraw his privileges. His appeal having been rejected as unfounded, he lodged an appeal with the Appeals Committee on 10 April 2008 requesting that the decision in question be quashed. The Committee held in its report of 18 December 2008 that the withdrawal decision had been appropriate, but it recommended that the complainant's Commissary privileges be restored, given that 12 months had elapsed since that decision had taken effect. The Director-General endorsed that recommendation by a decision of 5 March 2009, which the complainant impugned in the first complaint he lodged with the Tribunal.

Meanwhile, by a memorandum of 12 June 2008 the Director of the Human Resources Management Division notified the complainant that he proposed to impose on him the disciplinary measure of suspension without pay for two months, because on 20 October 2007 he had acted in breach of Manual Section 550 concerning security and emergency measures by entering the FAO premises with a friend of his who had no right of access. He had also acted in violation of paragraph 2.5 of Annex D to Manual Section 103, which provides that a person without a valid pass shall not be allowed by the guard to access the Commissary premises and Staff Regulations 301.1.1 and 301.1.4, which provide that staff members shall conduct themselves in a manner befitting their status as international civil servants and regulate their conduct with the interest of the FAO only in view. According to witness statements, the complainant was aware that his friend had entered the Commissary salesroom and he failed to inform the guard immediately of her presence. The Director invited the complainant to provide his comments within five days from receipt of the memorandum. The complainant did so on 24 June 2008. The matter was further discussed in late August between the Administration and the complainant, who contested the facts, but the disciplinary measure was confirmed on 17 October and took effect on 1 November 2008.

On 15 January 2009 the complainant submitted a second appeal to the Director-General, challenging the decision to suspend him without pay for two months. By a letter of 20 March he was informed that his appeal had been rejected as unfounded and therefore on 22 April he lodged an appeal with the Appeals Committee against that decision requesting inter alia that it be set aside. In mid-December he was informed of the composition of the Committee, and on 30 December he wrote to the Committee requesting that three of its five proposed members be replaced as they had already given an opinion on his previous appeal also concerning the facts that occurred on 20 October 2007. His request was rejected and the Committee met with the proposed members in January 2010. The complainant resigned from the Organization with effect from 7 January.

In its report of 18 March 2010 the Appeals Committee held that the decision to suspend the complainant without pay for two months was based on the same set of facts as those for which his Commissary privileges had been withdrawn; consequently, it found that there had been a violation of the principle against double jeopardy and recommended that the suspension decision be set aside. It also recommended that he be paid all the sums he would have been entitled to for the months of November and December 2008 had the measure of suspension without pay not been imposed on him; that he be refunded the amount of 1,178.31 euros he had to pay in health insurance contributions for those two months; that the Organization pay its contributions to the United Nations Joint Staff Pension Fund for the two months in question, including any supplements requested by the Fund; and, lastly, that any reference to the suspension measure be removed from his personal file. The complainant was informed on 18 March that the report to the Director-General had been sent to the Director of the Human Resources Management Division. Having received no final decision, he wrote to the Director-General on 12 July asking him when he would receive one. He indicated that since the prescribed time limit for taking a final decision had elapsed, he would file a complaint directly with the Tribunal if he did not receive a reply within seven days. Having received no reply, on 27 July he filed his

third complaint with the Tribunal, challenging the implied decision to reject his second appeal.

By a letter of 17 September 2010, which the complainant received on 24 September, the Director-General informed him that he had decided not to endorse the Appeals Committee's recommendations and consequently to reject his appeal as unfounded. He explained that the decision to withdraw his Commissary privileges and the decision to impose a disciplinary measure of suspension without pay were based on different grounds and distinct facts. The decision to withdraw his privileges had been taken immediately following the entry of one of his acquaintances into the Commissary salesroom and its aim was to protect the Organization and the Commissary from further violations of the Commissary rules and to ensure enforcement of tax privileges which is scrutinised by the host state, whereas the disciplinary measure of suspension without pay aimed at sanctioning him not only for having caused and been aware of the entry of a non-authorized person into the Commissary salesroom, but also for having facilitated the entry of such person onto FAO premises without special permission on a non-working day when visitors are not allowed access. The disciplinary measure had been taken on the basis of his unsatisfactory conduct as defined in Manual Section 330. Furthermore, the two measures in question were completely different in terms of their purpose and legal consequences. Thus, there was no breach of the rule against double jeopardy. The complainant impugns that decision in his fourth complaint.

B. The complainant contends that the impugned decision of 17 September 2010 was taken outside the time limit set out in Article VII, paragraph 3, of the Statute of the Tribunal, i.e. more than ninety days after the expiry of the sixty-day period following notification of his claim to the Organization. Therefore, the decision of 17 September 2010 must be deemed "belated".

On the merits, he alleges a violation of the rule against double jeopardy contending that he was sanctioned twice for the events that occurred on 20 October 2007, since the Organization first withdrew

his Commissary privileges and then imposed on him the disciplinary measure of suspension without pay.

He also alleges breach of due process on the grounds that the charges levelled at him in the memorandum of 12 June 2008 were not sufficiently precise and were made on the basis of witness statements on which he had not been given a chance to comment. In addition, the Appeals Committee acted in violation of the “principle of equality of arms” insofar as it failed to forward to him a copy of some of the documents it examined, namely a memorandum of 21 January 2010 setting out the position of the Organization concerning the complainant’s objection to the membership of the Committee and the FAO Legal Counsel’s advice on his case that the Chairman of the Committee requested in that respect. The complainant asks the Tribunal to order the FAO to produce these documents.

According to the complainant, the impugned decision was taken in breach of Staff Regulation 301.11.1 and Staff Rule 303.1.11, according to which the Appeals Committee shall advise the Director-General in cases of appeal by staff members regarding a grievance arising out of a disciplinary action or an administrative decision. He submits that since the Committee did not consider some of the arguments he raised in his appeal, the Director-General rejected some of his arguments without having received the Committee’s advice thereon. He also contends that the impugned decision was not sufficiently reasoned, as the Director-General rejected his appeal without replying to each of the arguments he had raised.

In his view, the Organization has failed to prove that his actions warranted the imposition of the disciplinary measure. He criticises the Appeals Committee for not having carried out a “reconstruction of the events” taking into account his statement of facts and also for not considering his detailed legal analysis of the grounds given for the disciplinary measure, and he argues that, because of these omissions, it failed to examine the legal basis of the disciplinary measure imposed on him. He adds that, according to Manual paragraph 550.3.1, security staff at the entrances of the

Headquarters buildings are responsible for the entry and exit of all persons; consequently, the guards on duty on 20 October 2007 should be held responsible for his friend's entry onto FAO premises, given that they were aware of her presence. The complainant alleges that the disciplinary measure was taken in retaliation for his having lodged an internal appeal against the withdrawal of his Commissary privileges and that the impugned decision is therefore tainted with misuse of authority.

Moreover, he alleges that the decision to suspend him without pay was disproportionate because the fact that his friend entered the Commissary salesroom did not prejudice the Organization; indeed, she did not buy any tax-free goods. Consequently, the Organization could not have been criticised by the host state, which allows the purchase of duty-free goods on FAO premises only for staff members. He points out that he had had an exemplary service record for 30 years.

The complainant further contends that the composition of the Appeals Committee was unlawful because three of its five members had already given their opinion on the events that occurred on 20 October 2007 when they examined the appeal he filed against the decision to suspend his Commissary privileges.

Lastly, he states that the Organization failed to warn him of the possible consequences of his act, emphasising that the guards on duty on 20 October 2007 did not warn him with respect to the entry of his friend into the Commissary salesroom. Therefore, the FAO acted in breach of the principle of good faith and did not comply with its duty to inform him.

In his third complaint he asks the Tribunal to set aside the implied decision to reject his appeal against the decision of 20 March 2009, which confirmed the decision to suspend him without pay for two months. In his fourth complaint he asks the Tribunal to join his third and fourth complaints and to set aside the decision of 17 September 2010, which expressly rejected his appeal against the decision to suspend him without pay. In both complaints he seeks material

damages in an amount equivalent to the sum he would have received had he not been suspended without pay for two months plus interest as from the date on which his salary should have been paid to him, as well as 1,178.31 euros corresponding to the health insurance premiums he had to pay to the FAO, together with interest calculated from the date on which those premiums were paid by him to the date on which they are reimbursed. He also claims payment of an amount equivalent to the contributions the Organization should have paid to the pension fund for November and December 2008, including “possible supplements requested by the Fund owing to the delay”, and a payment of 1,534.38 euros corresponding to the amount he had to pay as interest on a loan he had to take out owing to the non-payment of his salary. He also asks to be granted compensation for “professional damage” and damage to his reputation, together with moral damages. He asks that the FAO be ordered to remove any reference to the decision to suspend him without pay from his personal file and to publish the Tribunal’s judgment in the “FAO’s Newsletter”. He requests that his career be “reconstructed, with all the consequences involved, with reference to the months of November and December 2008”, and he seeks an award of costs. Lastly, he requests the Tribunal to order the Organization to produce the memorandum of 21 January 2010, the Appeals Committee’s request to the FAO Legal Counsel concerning the complainant’s objection to the membership of the Committee and the Legal Counsel’s advice in that respect.

C. In its reply the FAO agrees that the third and fourth complaints may be joined as the substance of the claims and the material facts are the same. It explains that it took the Director-General some time to take his final decision following receipt of the Appeals Committee’s report, because the case was complex and the Organization was then addressing, at one level or another, four appeals filed by the complainant. In these circumstances, it considers that the Director-General’s decision of 17 September 2010 was taken within a reasonable time.

In its view, it did not act in breach of the rule against double jeopardy given that the decision to withdraw the complainant's Commissary privileges and the disciplinary measure of suspension without pay were based on different grounds and distinct facts. It emphasises that paragraph 1.4 of Appendix D to Manual Section 103 allows disciplinary action to be taken in addition to the withdrawal of Commissary privileges. It explains that the withdrawal of the complainant's Commissary privileges was a precautionary measure taken because of his failure to take reasonable action to prevent an unauthorised person from entering the Commissary salesroom and his failure to stop her unauthorised presence when he became aware of it. The disciplinary measure was taken to sanction him for having been aware of his friend's violation of the Commissary rules and not acting to remedy this, and also because he had facilitated the entry of an unauthorised person onto FAO premises on a non-working day.

The Organization asserts that the complainant's right to due process was respected during the disciplinary procedure that led to the impugned decision. He was given the opportunity to state his case in writing, in his memorandum of 24 June 2008, and orally, in August 2008. It denies any breach of the principle of equality of arms explaining that the Appeals Committee's request for the FAO's views was made in order to allow the Organization to reply to his submissions. It adds that, according to Staff Rule 303.1.33, the Legal Counsel shall provide his legal advice to the Committee upon its request. It attaches to its reply a copy of the request for advice sent by the Appeals Committee to the Legal Counsel, the latter's advice and a copy of the FAO's memorandum of 21 January 2010. It explains that the Legal Counsel's advice was not attached to the Appeals Committee's report by mistake.

The FAO rejects the complainant's interpretation of Staff Regulation 301.11.1 and Staff Rule 303.1.11. It asserts that the Appeals Committee reviewed the background of the case and the submissions of the parties in order to establish essential facts and to make its recommendation. It considers that the Director-General's

decision to depart from the Committee's recommendation was adequately justified and submits that he was not required to give a detailed answer to each argument raised by the complainant.

It further contends that the disciplinary measure was legally justified and that the reasons on which it was based were clearly indicated in the memoranda of 12 June and 17 October 2008. The complainant had entered onto FAO premises with his friend and had not requested a visitor's pass for her. This situation was detrimental to the Organization, particularly because of the security risk incurred by having an unauthorised person on the premises and the possible difficulties which could arise with the host state in that respect. It was therefore reasonable to consider that the complainant had acted not only in breach of Staff Regulation 301.1.1, according to which staff members shall regulate their conduct with the interest of the FAO in sole view, but also in breach of Staff Regulation 301.1.4, according to which staff members shall conduct themselves at all times in a manner befitting their status as international civil servants, and in breach of the standards of conduct contained in Manual Section 304. The Organization submits that the complainant has failed to demonstrate that the disciplinary measure was tainted with misuse of authority.

The defendant also considers that the disciplinary measure of suspension without pay was proportionate, emphasising that this is by no means the most severe measure available. It adds that, in accordance with the Tribunal's case law, it has discretion in determining the appropriate disciplinary measure to be imposed on a staff member for unsatisfactory conduct.

It further asserts that the Appeals Committee was properly constituted. Indeed, the fact that a member has already considered the same facts in another appeal filed by the same person is not a reason foreseen in Staff Rule 303.1.22 or in Manual paragraph 331.2.31 (*recte*) to disqualify a member.

Lastly, the FAO contends that it acted in good faith and that the complainant did not need to be warned that his actions were or could be in violation of the rules governing access to the FAO premises and

to the Commissary salesroom, because at the time he was a guard and guards are supposed to enforce those rules.

Regarding the complainant's claims for redress, it submits that his claims for compensation are baseless since he has provided no proof of an injury. It stresses that he has not shown a causal link between his bank loan and the disciplinary measure imposed on him, and it considers that he should not therefore be awarded compensation in that respect.

D. In his rejoinder the complainant indicates that, when the decision of suspension without pay was taken, the Tribunal had not yet set aside the decision to suspend his Commissary privileges, and he therefore maintains that the decision to suspend him without pay was taken in breach of the rule against double jeopardy. He adds that the Tribunal set aside the decision to suspend his Commissary privileges on the grounds that he had not acted in breach of Annex D to Manual Section 103 concerning Commissary privileges. That ruling, he says, confirms that the measure of suspension without pay was disproportionate, particularly since the main ground for that measure, the abuse of Commissary privileges, was determined by the Tribunal to be unfounded. He adds that the guards on duty at the entrance to the FAO on 20 October 2007 permitted the entry of his friend, who reached the Commissary without passing through the FAO's building, and that he left his friend sitting outside the Commissary salesroom; consequently, he did not act in violation of the rules concerning entry of visitors.

In addition to the redress claimed in his complaints, he asks the Tribunal to award him exemplary damages. He specifies that he claims 40,493 euros in costs for these and the internal appeal proceedings. He explains that he was not able during the two months for which he received no salary to pay the instalments on a loan he had taken out to buy his house and that, consequently, he had to take out a second loan of 5,000 euros in order to pay inter alia these instalments.

E. In its surrejoinder the FAO maintains its position. It contends that the complainant's interpretation of the rules concerning access to FAO premises is incorrect. It explains that Manual Section 550.3 provides that access to Headquarters premises is allowed only for two categories of person: those who have received a "building pass" and those who have a valid reason to visit the Organization and who should apply for a visitor's pass, which is normally issued Monday to Friday and valid during working hours on the day it is issued. Any exception must be authorised by the Chief of the Security Service. Consequently, it remains an undisputed fact that the complainant acted in breach of applicable rules in bringing an unauthorised person onto FAO premises on a non-working day without having sought a visitor's pass or an authorisation from the Chief of the Security Service. As an Assistant Security Supervisor, the complainant must have been aware of these rules.

#### CONSIDERATIONS

1. The first case before the Tribunal concerned the sanction imposed on the complainant to suspend temporarily his Commissary privileges following an incident of 20 October 2007. This incident also led to the disciplinary sanction impugned in the third and fourth complaints. Having examined the first complaint, the Tribunal decided, in Judgment 3021, to set aside the impugned decision according to which the sanction of suspension of the complainant's Commissary privileges had been considered as appropriate. In the Tribunal's view, the suspension was unlawful. Given that the Director-General has a duty to take precautions to prevent abuse of Commissary privileges, it was open to the FAO to suspend the complainant's Commissary privileges, as an interim measure, for a reasonable period while it investigated the events in question. The investigation should not have taken more than one month; consequently, the withdrawal of privileges was not justified beyond

20 November 2007. The second complaint concerns an unrelated transfer decision which was found to be lawful by the Tribunal and the complaint was dismissed in its entirety in Judgment 3022.

2. In his third complaint, which is presently before the Tribunal, the complainant impugns the Director-General's implied rejection of the appeal he filed against the decision to impose on him the disciplinary measure of suspension without pay for two months with effect from 1 November 2008; as mentioned above that measure was imposed because of the events of 20 October 2007 which are detailed in Judgment 3021. On 18 March 2010 the complainant was informed that the Appeals Committee had sent its report for the Director-General to the Director of the Human Resources Management Division. On 12 July the complainant wrote to the Director-General asking him when he would receive a final decision and stating that he would file a complaint before the Tribunal if he had not received a response within seven days. Having received no response, on 27 July 2010 he filed his third complaint against the implied rejection of his appeal, pursuant to Article VII, paragraph 3, of the Statute of the Tribunal.

3. However, the Director-General took a final decision on 17 September 2010 rejecting the appeal. The complainant impugns that decision in his fourth complaint on the following grounds: belated decision; violation of the double jeopardy clause; procedural flaws; absence of reason; breach of due process; breach of the rule of proportionality; failure to fulfil the burden of proof; misuse of authority; unlawful composition of the Appeals Committee; lack of legal basis; and violation of the principles of good faith and the duty to inform. He requests that this complaint be joined with his third complaint. Indeed, the express decision of 17 September 2010 replaces the implied decision impugned in the third complaint. Since the third and fourth complaints raise the same issues of fact and law and seek the same redress, they shall be joined to form the subject of a single ruling.

4. In both complaints the complainant has applied for oral hearings so that he may call witnesses before the Tribunal. Considering that it is sufficiently informed by the parties' pleadings and their annexes, the Tribunal disallows the complainant's application for hearings.

5. In a letter dated 17 September 2010, the Director-General informed the complainant that he had decided not to accept the Appeals Committee's recommendations of 18 March 2010 and to reject his appeal as unfounded. He stated that there was no violation of the rule against double jeopardy for the following reasons:

- Firstly, the Committee made an error of fact in determining that the two measures imposed on him – the withdrawal of his Commissary privileges and his suspension without pay – were based on the same facts. The disciplinary measure of suspending him without pay was indeed intended as a sanction for the violation of Manual Section 103 (i.e. having caused and been aware of the entry of a non-authorized person into the Commissary salesroom). However, the measure was also to sanction the complainant for his violation of Manual Section 550, Staff Regulations 301.1.1 and 301.1.4 and Manual Section 304 on standards of conduct (i.e. having caused the entry of a non-authorized person onto FAO premises on a non-working day when visitors are not allowed).
- Secondly, the Committee made an error of law in considering time as being relevant to a determination as to whether the rule of double jeopardy had been breached or not.
- Thirdly, the Committee erred in not addressing fully the grounds for the complainant's allegation, and in particular the contention that the second measure had no purpose as the first measure "was only aimed at punishing". For the Organization, the first measure was of a precautionary nature, while the second was taken for

the complainant's violation of Commissary rules, security rules, standards of conduct and also Staff Regulations.

- Fourthly, the Committee misinterpreted Judgment 2861, which presents important differences with the complainant's case and does not support the Committee's determination that there had been a violation of the rule against double jeopardy.

To support his view that there was no violation of the rule against double jeopardy the Director-General pointed to Judgment 2231, in which the Tribunal held that the Organization was justified in imposing three different measures on a staff member who had stolen an item from the Commissary salesroom: demotion, transfer and withdrawal of Commissary privileges.

6. The Tribunal notes first that the impugned decision of 17 September 2010 was adopted six months after the Appeals Committee's report to the Director-General was issued and after the complainant had filed his third complaint with the Tribunal, though before the complaint was notified to the FAO. It also notes that the complainant wrote to the Director-General on 12 July 2010 asking him when he would receive a final decision. The fact that the FAO delivered the final decision only on 17 September 2010, which is long after the Appeals Committee had issued its report, left the complainant unnecessarily in the uncertainty as to the outcome of his appeal and compelled him to file two complaints: one against the implied rejection of his appeal and another one against the final express decision when he received it. He was then obliged to pay the costs incurred by filing two complaints and not only one. This could have been avoided had the Organization replied to his request for a final decision, by stating at least that the express decision was forthcoming. Therefore, the Tribunal will award the complainant damages in the amount of 3,000 euros.

7. Contrary to the complainant's assertion, the Tribunal is of the opinion that there was no violation of the rule against double jeopardy and that the disciplinary measure was legally justified. The

rule against double jeopardy “does not prevent disciplinary and non-disciplinary consequences attaching to the same acts or events. However, it does preclude the imposition of further disciplinary measures for acts or omissions that have already attracted a disciplinary sanction” (see Judgment 3126, under 17). Consequences deriving from separate norms can stem from the same fact. Each measure corresponds to a different interest of the Organization and therefore it is possible that one fact can have numerous consequences without violating the rule against double jeopardy. Moreover, in his first case, Judgment 3021, the complainant was accused of having acted in breach of Annex D to Manual Section 103, but the Tribunal found that his behaviour did not fall within that rule.

8. In the present case, with regard to the consideration of double jeopardy, it is clear that the Organization based the decision to withdraw the complainant’s Commissary privileges as an interim measure on Annex D to Manual Section 103. The Director-General stated in the impugned decision that while “the disciplinary measure [of suspension without pay] was also intended to sanction [the complainant] for the violation of Manual Section 103 by having caused and been aware of the entry of a non-authorized person into the Commissary salesroom, it was also based on the fact that [the complainant] had caused the entry of a non-authorized person onto FAO premises ([he] entered the premises with the person and did not ask for a special permission for her to be present on the premises) on a Saturday, a non-working day, when visitors are not allowed, in violation of Manual Section 550 [...]. As a result of [his] conduct, [he] violated fundamental [rules] governing staff conduct (Staff [Regulations] 301.1.1 and 301.1.4), Manual Sections 103 and 550, as well as the standards of conduct contained in Manual Section 304, especially given [his] status as an Assistant Security Supervisor.” Given that the above information was repeated to the complainant in memoranda preceding the imposition of the sanction, and was substantiated throughout the disciplinary proceedings, it is clear that the disciplinary action was legally grounded.

9. Further, there is no established rule, according to which “the application of both types of measure for the same set of facts [...] should be taken more or less contemporaneously”, as stated by the Appeals Committee in its report. The general rule which is in force is that any measure has to be taken within a reasonable time. In this case, the complainant was advised by an e-mail dated 29 October 2007 that the Human Resources Management Division would handle the disciplinary aspects of the incident of 20 October 2007. In a memorandum of 4 January 2008 the Chief of the Security Service recommended to the Director of Human Resources Management Division that administrative or disciplinary action be taken with regard to the complainant’s conduct of 20 October 2007. By memorandum of 12 June 2008 the Director informed the complainant that he proposed to impose on him the disciplinary measure of suspension without pay for two months, pursuant to Manual paragraph 330.2.21. The complainant, who had been invited to comment on the proposed measure, contested the facts but the disciplinary measure was confirmed on 17 October 2008 and took effect on 1 November 2008. In view of the complexity of the case and the detailed documents to be reviewed in relation to the concurrent appeals, the Tribunal finds that the time spent in deciding and confirming the disciplinary measure of suspension without pay was reasonable.

10. The complainant contends that the Director-General’s decision is flawed for “absence and/or insufficiency of reason”. He argues that, except with respect to the question of double jeopardy, the Director-General “limited himself to reporting, without adding anything else, the assertions of the Appeals Committee”, and that his “decision appears to be substantiated simply by referring to judgment No. 2861 of the Tribunal”. The case law has consistently provided that “[t]here is a duty to explain a decision or a conclusion because everyone concerned has to know the reasons for it [...] [b]ut the duty will be discharged even if the reasons are stated in some other text to which there is express or even implied reference, for example where a higher authority endorses the reasoning of a lower

one or a recommendation by some advisory body” (see in particular Judgment 1673, under 6). Consequently, the Director-General, in his final decision, was not required to provide a detailed reply to each of the objections raised by the complainant. He merely had to state reasons for adopting or rejecting the recommendation of the advisory body and the reason on which the original decision was based. In his five-page decision of 17 September, the Director-General clearly described the complainant’s unsatisfactory conduct and the rules he had violated. He also made implicit reference to the memoranda leading to the decision to suspend him without pay for two months. The decision was therefore detailed and reasonable. Consequently, the Organization has fulfilled the requirement of providing a justified decision and the complainant’s plea is unfounded.

11. The complainant asserts that in the memorandum of 12 June 2008 the charges were not precisely worded, and that while some rules were quoted it was not clarified to which exact points the Organization meant to refer and, above all, how the violations he had allegedly committed could be related to the rules themselves. He also states that the four witness statements which were attached to the memorandum of 4 January 2008 mentioned above had been taken without his knowledge and without allowing him to be present for cross-examination. Citing these examples as well as the case law regarding the right to be heard before a sanction is imposed, he alleges breach of due process with regard to the disciplinary procedure. It is to be noted that the seven-page memorandum of 12 June, with the attached three-page memorandum of 4 January, clearly states the complainant’s actions which gave rise to the recommendation for disciplinary action, the specific Staff Regulations and Manual Sections (and their relevant extracts) that were violated by such conduct, and specifies the time limit for submitting a reply to the charges. Furthermore, the evidence shows that the complainant was given the opportunity to state his case in writing and orally throughout the course of the proceedings and present his response to the charges against him (including the witness testimonies) prior to the sanction of

suspension without pay being imposed on him. The complainant's allegation of breach of due process is therefore unfounded.

12. The complainant further asserts that the Organization has not met its burden of proof. However, it is uncontested that he brought an unauthorised person onto FAO premises on a day when visitors were not allowed, without asking for special permission for her presence and that he was with her in the Commissary salesroom for 16 minutes. Those actions contravened the rules of the Organization and formed the basis for the disciplinary measure imposed on the complainant. His assertion is therefore unfounded.

13. The complainant alleges misuse of authority. It is clearly in the Organization's interest to sanction unsatisfactory conduct on the part of its staff members. The charges which formed the basis for the decision were substantiated and precisely worded, the complainant was given the opportunity to reply, and the Organization's conclusions of fact were based on clear evidence. On his part, the complainant has presented no evidence that the decision was taken for reasons other than those stated by the Director-General. There was therefore no misuse of authority.

14. He also alleges that the disciplinary measure was disproportionate. It was within the discretionary authority of the Director-General to set the duration of the disciplinary sanction and according to its case law the Tribunal will not interfere unless the decision shows some fatal flaw (see Judgments 207, 2262, 2849 and 2944).

The Tribunal notes that Manual paragraph 330.2.21 does not specify a maximum duration for the measure of suspension without pay, it merely provides that it must be for a specified period. The complainant's behaviour, while not being considered an abuse of Commissary privileges under Annex D to Manual Section 103, was in contravention of the Commissary Rules, as well as the Organization's rules concerning the entry of an unauthorised person onto FAO

premises. The complainant, being an Assistant Security Supervisor, was not only well aware of those rules, and tasked with enforcing them, but should also have been setting an example for other staff, and the fact that he acted in violation of applicable rules was rightly considered to be unsatisfactory conduct. The complainant has not shown that his case was treated differently to another case similar to his in fact and in law. As such, the disciplinary measure of suspension without pay for two months was legally justified and proportionate.

15. The complainant's argument that the composition of the Appeals Committee was unlawful, is likewise unfounded, as is his argument concerning violation of "the principle of equality of arms". The complainant objected, in his memorandum to the Secretary of the Appeals Committee, that three members of the Committee had already considered the same facts in a previous appeal. The Committee, having received the Organization's comments on the complainant's objection and the advice from the Legal Counsel, pursuant to Manual paragraph 331.3.5 and Staff Rule 303.1.33, rejected the complainant's objection to its composition. The Tribunal considers that the specific rule relating to disqualification of members of the Appeals Committee stated in Manual paragraph 331.2.31 is not a complete and exhaustive statement of the circumstances in which a member is disqualified from hearing an appeal. The fundamental function of the internal appeal procedure, which is "an important safeguard of staff rights and social harmony" (see Judgment 1317, under 31), requires that "the members of an internal appeal body should not only be impartial and objective in fact, but that they should so conduct themselves and be so circumstanced that a reasonable person in possession of the facts would not think otherwise. In this last regard, it is necessary only to observe that staff confidence in internal appeal procedures is essential to the workings of all international organisations and to preventing disputes from going outside those organisations" (see Judgment 2671, under 11). If a member of the Appeals Committee had already expressed a concluded view on the merits of an appeal and was later

appointed to a new Appeals Committee to express an opinion on the same merits in a later appeal, their impartiality and objectivity could be questioned.

However, in the present case, the two appeals in question shared some facts in common but the issues were completely different. Specifically, the previous appeal regarded an administrative decision to suspend the complainant's Commissary privileges in response to an alleged abuse of these privileges, whereas the later appeal regarded a disciplinary sanction for the alleged violation of the Organization's rules as detailed above. Moreover, the request for the Legal Counsel's view, made by the Chairman of the Appeals Committee, on a legal question which was related to the recusal of three members of the Appeals Committee, was proper and consistent with Staff Rule 303.1.33. The complainant alleges a violation of the principle of equality of arms because the Appeals Committee did not inform him that it had requested the Organization's views and the Legal Counsel's advice regarding his objection to three of the members. Staff Rule 303.1.342 requires that the staff member have access to all pertinent documents considered by the Committee. The legal advice and the Organization's view should have been communicated to the complainant. However, this non-compliance with Staff Rule 303.1.342 does not vitiate the decision of the members to continue to hear the appeal as this decision was, in the circumstances, correct.

16. Lastly, the complainant contends that there was a procedural flaw in that Staff Regulation 301.11.1 and Staff Rule 303.1.11 were violated. The Appeals Committee found that the impugned decision violated the rule against double jeopardy, which was enough to vitiate the decision and justify the recommendation to set it aside. As such, it was not necessary for the Committee to treat each of the claims of the appeal individually, as they were absorbed by the recommendation to set aside the decision. Therefore, its opinion was properly rendered and the Director-General had no legal obligation to request a specific recommendation for each of the remaining claims.

17. It follows from the foregoing that there is no evidence that the Organization has acted in bad faith or that it has not fulfilled its duty to inform. As the complainant succeeds in part, the Tribunal will award costs in the amount of 2,000 euros.

#### DECISION

For the above reasons,

1. The FAO shall pay the complainant damages in the amount of 3,000 euros.
2. It shall also pay him costs in the amount of 2,000 euros.
3. The complaints are otherwise dismissed.

In witness of this judgment, adopted on 9 November 2012, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Giuseppe Barbagallo  
Dolores M. Hansen  
Michael F. Moore  
Catherine Comtet