

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S.
v.
FAO

123rd Session

Judgment No. 3744

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. S. against the Food and Agriculture Organization of the United Nations (FAO) on 18 August 2014 and corrected on 29 September 2014, the FAO's reply of 21 January 2015, the complainant's rejoinder of 12 March and the FAO's surrejoinder of 13 May 2015;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the FAO's decision to terminate his appointment for health reasons.

The complainant joined the FAO in July 2000 as a Security Guard at the G-2 level. In 2006 his appointment was converted into a continuing appointment. On 18 September 2009, while on duty, he fell from a staircase, struck his head on the ground and lost consciousness for approximately 90 minutes. He was found by his colleagues unconscious, was taken to the hospital by the emergency services and was discharged the following day. On 19 September 2009 he was placed on certified sick leave.

On 6 October 2009 he submitted a request for consideration of his injury as service-incurred together with an FAO Accident Report

(form ADM62). On 2 November 2009 he was informed by the Secretary of the Advisory Committee on Compensation Claims (ACCC) that his accident was recognised as service-incurred and that he was therefore entitled to “reimbursement of [his] authorised related reasonable medical expenses”.

In September 2010 the FAO Senior Medical Officer submitted the complainant’s case to the FAO Staff Pension Committee for consideration of his eligibility for a disability benefit. Noting that the complainant was deemed incapable of resuming his duties and that it was not foreseen that his medical condition would significantly change in the near future, he recommended that the complainant be granted such a benefit. On 13 October 2010 the Staff Pension Committee discussed the complainant’s case and decided to postpone its decision on his eligibility for a disability benefit until he had exhausted his remaining sick leave entitlements.

On 1 June 2011, after a series of medical examinations had been performed on the complainant by external physicians, the FAO Chief Medical Officer informed the Secretary of the Staff Pension Committee that the Medical Service was withdrawing its favourable recommendation for the granting of a disability benefit.

By a letter of 9 June 2011, the Director of the Human Resources Management Division (CSH) informed the complainant that the Staff Pension Committee had unanimously decided that his case did not qualify to be considered for a disability benefit. He explained that in reaching this decision the Committee had taken note of the complainant’s latest medical examinations which had indicated that, while he could not be reassigned to his previous position as a Security Guard due to health issues, which he ought to address, he was fit to return to work. The Director of CSH also informed the complainant that he had arranged for him to meet with the Chief of Recruitment (CSHR) to discuss future employment opportunities as a redeployment candidate.

On 7 October 2011 the Chief Medical Officer confirmed to CSHR that the Medical Service could not endorse the complainant’s return to work as a Security Guard and recommended that he be considered for other positions. Soon after, an assignment was found for him as a temporary cashier in the FAO internal shop. On 20 October 2011 he commenced work, but after a few hours, he complained of dizziness. That

same day the Chief Medical Officer wrote to CSHR recommending that the FAO move forward with the complainant's separation on medical grounds, if no other suitable position could be identified for him. On 21 October 2011 CSHR confirmed that there were no vacancies at the G-2 level commensurate with the complainant's skills and experience. On 25 November 2011 the Chief Medical Officer initiated action to terminate the complainant's appointment for health reasons. By a memorandum of 29 November 2011 the Director of CSH informed the complainant of the proposed termination of his appointment under Staff Regulation 301.9.14 and Staff Rule 302.9.22, since there was no vacant position commensurate with his qualifications and medical condition.

In a letter of 13 December 2011 the complainant objected to the proposed termination of his appointment and requested that a medical board be convened to investigate the medical aspects of his case. The chair of the medical board, Dr T., issued a report on 31 May 2012 in which he concluded that the complainant was not fit to return to work in his capacity as security officer and that his personality structure prevented him from being successfully redeployed in other duties. Accordingly, his separation from the FAO under Staff Rule 302.9.22 was recommended. On 6 June 2012 the Chief Medical Officer informed the Assistant Director-General of Corporate Services Department (ADG/CS) that he concurred with Dr T.'s recommendation. By a memorandum of 21 June 2012, the Director of CSH gave the complainant formal notice of the decision to terminate his appointment for health reasons with effect from the date of delivery of said memorandum. The complainant separated from the FAO on 25 June 2012.

On 24 July 2012 the complainant lodged an appeal with the Director-General challenging the decision to terminate his appointment. This appeal was rejected and on 28 November 2012 he filed an appeal with the Appeals Committee. In its report dated 25 November 2013, the Committee found that the FAO had complied with all the applicable rules and procedures and that there was no reason why the contested decision should be set aside. It recommended that the appeal be dismissed in its entirety. By a letter of 19 May 2014, the Director-General notified

the complainant of his decision to accept the Appeals Committee's recommendation. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to order the FAO to pay him exemplary damages for having deprived him of the right to enjoy social protection. He also asks that the FAO be ordered to pay him the salaries and all other sums, including step increases, to which he would have been entitled had he been an active staff member as from 25 June 2012 up to the day on which compensation is paid. He seeks interest on these amounts from 25 June 2012 until the day on which compensation is paid. In addition, he asks that the FAO be ordered to pay his pension contributions to the United Nations Joint Staff Pension Fund (UNJSPF) from 25 June 2012 up to the day on which compensation is paid, including possible supplements requested by the UNJSPF owing to the delay. Alternatively, the complainant claims material damages corresponding to the entire sum of the disability benefit of which he was unlawfully deprived and which should be equivalent to the retirement benefit he would have received for the rest of his life (i.e. until the average age of 75), had he continued working with the FAO at the same level and step until the normal retirement age of 60. He also claims 20,000 euros for the damage to his reputation and 30,000 euros for the erroneous diagnosis of malingering made by Dr P., the FAO's nominee on the medical board. He asks the Tribunal to recognise that his medical condition is due to his service-incurred accident of 18 September 2009 and, consequently, to also recognise his right to payment of material damages corresponding to the entire sum of the service-incurred disability benefit, which he would have received for the rest of his life (i.e. until the average age of 75). Lastly, he claims 50,000 euros in moral damages for having ended his career at the FAO without being assigned any tasks for an entire year.

The FAO requests that the complaint be dismissed as irreceivable to the extent that it includes claims for relief that are not based on the decision to terminate the complainant's appointment for health reasons. It otherwise requests that it be dismissed as unfounded.

CONSIDERATIONS

1. The complainant seeks an order to set aside the impugned decision dated 19 May 2014, by which the Director-General notified him that he had accepted the Appeals Committee's recommendation to dismiss his internal appeal of 28 November 2012 against the decision to terminate his appointment with the FAO for health reasons pursuant to Staff Regulation 301.9.14, Staff Rule 302.9.22 and paragraph 314.2.3.4 of the Administrative Manual. This was his main claim in his internal appeal dated 24 July 2012 in which he had essentially challenged the decision to terminate his appointment. In that appeal he had stated that the decision and the events leading to the termination of his appointment were unlawful and had caused him "physical suffering, mental anguish, fear for the future for [his] two dependent daughters and [himself], anxiety, a besmirched reputation, loss of pride in the community and personal humiliation".

2. In his complaint, however, the complainant had also sought reliefs "with regard to the fact that [he has] been deprived of the right to [...] enjoy social protection scheme for those staff who are incapacitated" and with respect to "the disability benefits, of which [he has] been unlawfully deprived". It is observed that the complainant had also raised these two matters in his internal appeal. He insisted that he had a right to the disability benefit and requested the Appeals Committee to deem the termination of that benefit unlawful and an erroneous interruption of the disability benefit procedure which the FAO had unlawfully and deliberately stopped.

3. The decision to stop the payment of the disability benefit to the complainant under the FAO's Staff Compensation Plan was communicated to him by the Director of the Human Resources Management Division by a letter dated 9 June 2011. He did not challenge that decision but inserted what in effect is a challenge in his internal appeal on the ground that the FAO had failed to comply with Section H.3 of the UNJSPF Regulations and Rules. The decision not to consider him for compensation for partial impairment was communicated to him by the Secretary of

the ACCC by letter dated 29 August 2012. This was after he filed his “[a]ppeal to the Director-General” against the decision to terminate his appointment, which he appealed to the Appeals Committee and is properly the subject of the present claim before the Tribunal.

4. The Tribunal considers that any claim which the complainant seeks to advance, and related reliefs, concerning disability benefits and compensation for partial impairment are irreceivable. This is because the complainant did not exhaust the internal remedies available to him, as required by Article VII, paragraph 1, of the Tribunal’s Statute, in relation to them within the scope of the present complaint.

5. In any event the complainant has made a claim for compensation for partial impairment, which is the subject of another complaint before the Tribunal and which is considered in another judgment (see Judgment 3745). Additionally, as the Appeals Committee found, it had no competence to review any claim concerning the complainant’s right to disability benefits as those matters are governed by the UNJSPF Regulations. The challenge to such decisions is to be made eventually to the United Nations Appeals Tribunal. As the Appeals Committee stated, under Manual paragraph 331.1.23, “[a]ppeals against decisions, or request for reconsideration of decisions, on Joint Staff Pension Fund matters are covered in Manual Section 341, United Nations Joint Staff Pension Fund”. Further, that Manual paragraph 341.5 provides that “Section K of the UNJSPF Rules prescribes the procedure applicable to appeals against decisions on disability benefits and other decisions taken by the FAO Staff Pension Committee or by its Secretary in the exercise of powers conferred by the UNJSPF Regulations or Rules” and that “in accordance with FAO Staff Regulation 301.11.3 and Article 48 of the UNJSPF Regulations, applications from staff members [...] or any other person who can show that he/she is entitled to rights under the UNJSPF Regulations, alleging non-observance of the UNJSPF Regulations and Rules, are considered by the United Nations [Appeals] Tribunal”.

6. The claim concerning the decision by which the complainant’s appointment was terminated for health reasons will be determined against

the applicable provisions, which will be relevantly reproduced. In this regard it is noted that the complainant's appointment was terminated expressly pursuant to Staff Regulation 301.9.14 and Staff Rule 302.9.22, and considering paragraph 314.2.3.4 of the Administrative Manual. Staff Rule 302.9.21 is also reproduced given the reliance which the complainant places upon it. First, however, it is observed that the Director-General is empowered, under Staff Regulation 301.9.1(iii), to terminate the appointment of a staff member who holds a continuing appointment, "who is, for reasons of health, incapacitated for further service".

7. Staff Regulation 301.9.14 relevantly states as follows:

"The Director-General may, on the advice of the Organization's Medical Officer, terminate the appointment of a staff member who holds a continuing [...] appointment, on finding that the staff member is unable to perform assigned duties because of physical or mental limitations, and that although the staff member would be qualified and suitable for another post in the Organization, no such post is vacant."

Staff Rule 302.9.22 relevantly states as follows:

"Physical or Mental Limitations. The appointment of staff members who have neither attained the mandatory age of retirement established in the Staff Regulations nor become incapacitated for further service, but who have physical or mental limitations which render them unable to perform the duties currently assigned to them, may be terminated at any time if no other post commensurate with their professional qualifications and current health condition is vacant within the Organization."

Staff Rule 302.9.21, upon which the complainant relies, states as follows:

"Incapacity for further service. The appointment of staff members who have not attained the mandatory age of retirement established in the Staff Regulations, but whose physical or mental condition or extended illness render them incapacitated for further service, may be terminated after exhaustion of any sick leave entitlement."

Paragraph 314.2.3.4 of the Administrative Manual states as follows:

"If the Chief Medical Officer reports that a staff member, while he/she has physical or mental limitations which render him/her unable to perform the duties currently assigned would be suitable for another post in the Organization, the Director, OHR, makes every effort to find a vacant post commensurate with the staff member's professional qualifications and current condition."

- (a) If such a post can be found, the relevant provisions of Manual Section 311 apply.
- (b) If no such post can be found, or if the Chief Medical Officer has recommended that the appointment of the staff member be terminated for incapacity for further service, the ADG, CS, informs the staff member by confidential memorandum, with copy to the Director, OHR, of the action it is proposed to take and the reasons therefor, giving formal notice in accordance with Staff Rule 302.9.3. The memorandum sets out the staff member's termination entitlements as established in this Manual Section, and informs him/her of his/her rights under Staff Rule 302.9.23 of Chapter XI of the Staff Rules. When it is proposed to terminate the appointment under Staff Rule 302.9.21, the memorandum also informs the staff member that eligibility for a disability benefit from the United Nations Joint Staff Pension Fund will be determined by the FAO Staff Pension Committee."

8. These provisions are clear and unambiguous and are to be interpreted as such in keeping with the statement in Judgment 1456, for example, that "[i]n construing the rules the Tribunal is bound to take an objective view and pay heed, in line with the method approved in international law, to their wording, context, purport and purpose" (see Judgment 1456, under 16).

9. The complainant seeks to challenge the impugned decision concerning the termination of his appointment essentially on three grounds. First, he submits that the decision was flawed by misuse of authority, without making appropriate inquiries beforehand about alternative posts which he could have filled, and was made on errors of fact and law and not in the superior interest of the FAO. In the second place, he submits that the decision was coloured by abuse of power, and, thirdly, that the decision was made in violation of the principles of good faith or the FAO's duty of care and its duty to inform.

10. On the first mentioned ground, the complainant's case may be summarized as follows: the FAO did not observe the applicable rules for terminating his appointment for health reasons. His period of certified sick leave ended in June 2011 and he was at work in November 2011 when the FAO initiated the procedure to terminate his appointment.

The FAO did not initiate the procedure while he was on sick leave and the procedure was not contiguous to that leave. The words “at any time” in Staff Rule 302.9.22 under which the FAO purported to terminate his appointment cannot cover actions taken or procedures initiated several months after certified sick leave. He was not assigned to a duty which he was unable to perform when the termination procedure was initiated and Staff Rule 302.9.22 is applicable only when staff members are “unable to perform the duties currently assigned to them”. The termination procedure under Staff Rule 302.9.22 applies only where a staff member has used her or his sick leave with full pay before the matter is brought to the attention of the designated Medical Officer while the staff member is on sick leave with half pay. The words “nor become incapacitated for further service” mean that Staff Rule 302.9.22 cannot be applied in a case where a staff member becomes incapacitated for further service. It therefore could not have been applied in his case since the Medical Board confirmed in its final report that he was not fit to return to work as a security officer and that his pathological personality structure still needed to be addressed and, so far, prevented him from being successfully redeployed in other duties. According to the complainant, since he could not have been redeployed to any other duty he was not fit for further service in the FAO which means that he was incapacitated for further service and his case should have been dealt with as a case of incapacity.

11. Essentially, these assertions are rooted in the premise that the circumstances of his case required the FAO to institute the incapacity procedure under Staff Rule 302.9.21 rather than the termination procedure under Staff Rule 302.9.22. The question is, however, whether the FAO unlawfully initiated the termination procedure in the present case.

12. The Director-General’s power, under Staff Regulation 301.9.14, to terminate the complainant’s appointment may be evoked on two conditions. The first is that he had to act, as the Director-General did in the present case, on the advice of the FAO’s Medical Officer. This Officer found that the complainant was unable to perform assigned duties because of physical or mental limitations. The second condition is that the complainant was qualified and suitable for another post in the Organization

and there was no such post that was vacant. The FAO made some efforts to re-assign the complainant and actually assigned him to the post of cashier in the FAO internal shop. It was his inability to perform the duties there and, in addition, concerns about his medical condition which caused the FAO to pursue the termination procedure. All indications from the resultant medical reports, as confirmed in the final report of the Medical Board, suggest that the second condition was also satisfied.

13. Another inquiry is whether the conditions for the termination of the complainant's appointment under Staff Rule 302.9.22, which the FAO invoked, were met. Under this provision the Director-General could have terminated his appointment at any time. However, three conditions for termination had to be met. One condition was that the complainant had not "attained the mandatory age of retirement established in the Staff Regulations". This condition was met. A second condition was that "no other post commensurate with their professional qualifications and current health condition [was] vacant within the Organization". Again, all indications from the resultant medical reports, as confirmed in the final report of the Medical Board, establish that the second condition was satisfied, particularly on the conclusions of the Medical Board referred to in the early part of the following consideration of this judgment.

14. The third condition was that he had not become "incapacitated for further service" but had "physical or mental limitations which render [him] unable to perform the duties currently assigned to [him]". The complainant's view is that the medical reports, including the "Report and recommendations of the Medical Board" dated 31 May 2012, concluded that the incapacity procedure should have been followed. He relies, in particular, on the conclusion of the Medical Board when it stated that he "is not fit to return to work in his capacity of a security officer. Furthermore the pathological personality structure still needed to be addressed and, so far, prevented him from being successfully redeployed in other duties." The Tribunal considers that while this is a statement that the complainant had "physical or mental limitations which render [him] unable to perform the duties currently assigned to [him]" it is not a statement that he was "incapacitated for further service". Accordingly, it was within the purview of the Medical Board to recommend his separation

from the FAO under Staff Rule 302.9.22, as it did. The Tribunal is also satisfied, on the evidence, that the FAO made reasonable efforts to find suitable alternative posts to which to redeploy the complainant pursuant to Staff Rule 302.9.22, and could have terminated the complainant's appointment under that Rule rather than under Staff Rule 302.9.21. It follows that the complaint fails on this ground.

15. This is consistent with the earlier interpretation of Staff Rule 302.9.22 in consideration 15 of Judgment 3022:

“Staff Rule 302.9.22 clearly states that ‘[t]he appointment of staff members [...] who have physical or mental limitations which render them unable to perform the duties currently assigned to them, may be terminated **at any time**’ (emphasis added). Furthermore, initiating a termination procedure after the complainant had been on certified sick leave for over four months cannot be considered hasty or unreasonable, especially considering the occupational health concerns raised in connection with the complainant's ability to discharge the duties of Assistant Security Supervisor. Moreover, the Chief Medical Officer's authority stems from his experience as a medical practitioner and as an expert who considers the suitability of specific posts within the Organization having regard to occupational health. He acted properly in relying on the medical certificates submitted by the complainant, as there was no indication that they were untrue or unreliable – which could have led him to request a separate analysis by a medical practitioner chosen by the FAO – and there is no evidence to support the dissenting opinion that a personal consultation by the Chief Medical Officer would have led to a more accurate health assessment.”

16. It is additionally found that the complaint also fails on the ground of abuse of power, on which the complainant seeks to challenge the impugned decision to terminate his appointment on the basis that the FAO unlawfully applied Staff Rule 302.9.22 when it should have applied Staff Rule 302.9.21. As stated in consideration 14 of this judgment, the FAO did not err by initiating the termination procedure under Staff Rule 302.9.22. The complaint is therefore unfounded on these grounds. There is no evidence that the FAO violated the principle of good faith, its duty of care or its duty to inform the complainant, as he submits in his third ground of the complaint.

17. In the foregoing premises, the complaint is unfounded and will be dismissed in its entirety.

18. The Tribunal also rejects the complainant's request to join this complaint and his second complaint, which is referred to in consideration 5 of this judgment, as they were the subject of different proceedings.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 27 October 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ