

W.
v.
FAO

124th Session

Judgment No. 3881

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr H. W. against the Food and Agriculture Organization of the United Nations (FAO) on 23 March 2015 and corrected on 27 April, the FAO's reply of 13 July, the complainant's rejoinder of 7 August and the FAO's surrejoinder of 3 November 2015;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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

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

The complainant challenges the decision not to grant him sick leave after his dismissal for misconduct.

The complainant joined the FAO in 2010 under a fixed-term appointment. On 19 August 2013 he received a memorandum dated 13 August, informing him of the decision to dismiss him for misconduct with immediate effect. That decision is the subject of his second complaint before the Tribunal. The memorandum also indicated that he would receive compensation in lieu of notice pursuant to FAO Administrative Manual paragraph 314.4.1.

On 27 August 2013 the complainant reported to the FAO Medical Unit to undertake the compulsory exit medical examination. He then provided the Senior Medical Officer (SMO) with two medical certificates.

One covered the period from 12 to 14 August and the other the period from 27 August to 15 September. Later that day the SMO sent an e-mail to the complainant's supervisor stating that the complainant "w[ould] be on justified sick leave out of duty station from today 27 August to 15 September 2013". The complainant similarly informed the Administration and asked whether the date of his separation would be postponed until the end of his certified sick leave. In subsequent communications the Administration informed him that according to Staff Rule 302.6.27 "[e]ntitlement to sick leave shall terminate on the date of termination of a staff member's appointment" and that no sick leave was granted to staff members during periods for which they received compensation in lieu of notice. The complainant's sick leave entitlement had thus ended on 19 August.

The complainant's appeal to the Director-General against the decision to deny him sick leave entitlements was dismissed as unfounded on 20 December 2013. He then lodged an appeal with the Appeals Committee, which unanimously found in its report of 12 December 2014 that, as the complainant had ceased to be employed by the FAO as from 19 August 2013, he was no longer entitled to sick leave. The Appeals Committee recommended dismissing the appeal, which the Director-General did by a letter of 13 February 2015. That is the impugned decision.

The complainant seeks an order to "[s]et aside the decision of the [FAO] regarding [its] refusal to grant [him] sick leave after 27 August 2013 and payment of sick leave thereafter for as long as [he] remained unfit for duty for reasons of health, plus interest at the rate of 5 per cent a year from 27 August 2013". He also asks the Tribunal to order the FAO to acknowledge his medical condition, which he states was certified by two independent medical practitioners at the time of separation and endorsed by the Senior Medical Officer (SMO). He also seeks "compensatory damages", moral damages and costs.

The FAO contends that the complaint should be dismissed as entirely unfounded.

CONSIDERATIONS

1. The complainant puts forward three pleas. His first plea is that there was a breach of the Staff Regulations as the FAO failed to provide the compulsory exit medical examination. His second plea is that there was a breach of the Staff Regulations and an infringement of international labour standards as the FAO denied his sick leave entitlements and terminated his employment while he was on sick leave. His third plea is that the Administration's inconsistent application of the sick leave policy amounted to unequal treatment and resulted in a breach of his right to privacy because it communicated confidential medical information in the course of the internal proceedings without his consent.

2. The complainant introduces this complaint as follows:

“On 19 August 2013, I received the notice of dismissal for misconduct for one-day of unauthorized medical leave taken on 17 May 2013. The memorandum of dismissal indicated that I would receive payment in lieu of notice and that I would be contacted by the HR officer regarding the appropriate separation formalities.”

These separation formalities included the complainant undergoing the compulsory exit medical examination, pursuant to Manual paragraph 343.1.21(a)(3), which he alleges in his first plea the FAO failed to provide. This will be considered later. His second plea will be considered at this juncture.

3. In his second plea, the complainant alleges that the FAO denied him sick leave entitlements and terminated his employment while he was on sick leave. The complainant provides a certificate which indicates that he was ill from 27 August 2013 to 15 September 2013. However, the FAO terminated his employment on 19 August 2013 with immediate effect and paid him compensation in lieu of notice. Staff Rule 302.9.34, which provides for this, states as follows:

“In lieu of the notice period, the Director-General may authorize compensation calculated on the basis of the salary and allowances which the staff member would have received had the date of termination been at the end of the notice period.”

4. In application of this provision, the actual or effective date of termination was 19 August 2013 and not at the end of a notice period. Since Staff Rule 302.6.27 states that entitlement to sick leave shall terminate on the date of termination of a staff member's appointment, the complainant was not entitled to claim sick leave for the period 27 August to 15 September 2013, after the effective date of the termination of his employment. It is noted that the complainant relies on Judgment 938 to support his claim for payment for the subject sick leave. However, Judgment 938 does not assist the complainant in light of Staff Rule 302.6.27 and the scope of Judgment 938, as explained as follows in considerations 15 to 17 of Judgment 3604:

“15. In Judgment 938, [...] The Tribunal stated that a determination was to be made, on considering the Food and Agriculture Organization's (FAO) Rules on sick leave in light of the facts in the case, as to [the complainant's] ability to return to work. It found that there was no Rule that prevented her from receiving sickness benefits because her contract ended on 30 June 1986. This was the context in which the Tribunal stated that “a staff member cannot be separated while on sick leave”, and, accordingly, determined as follows, in consideration 13:

‘Since the Organization does not contest the medical certificates supplied, it is accepted that the complainant needed leave until 2 August 1986 and she is entitled to have her separation calculated as of that date, not 30 June.’

16. The Tribunal subsequently explained this aforementioned decision taken in Judgment 938. Accordingly, it stated the following in Judgment 3175, under 13 and 14:

‘13. The Tribunal notes, however, that although in some of the judgments cited by the complainant an official's appointment had been extended because that person's contract had ended during sick leave, the circumstances of the instant case are different to those in the cases concerned by those judgments, because in the [Organization] there is no legal provision or administrative practice permitting the extension of a contract until the end of sick leave.

14. Moreover, as the Organization points out, the Tribunal has clarified its position regarding the extension of a contract to cover sick leave. In Judgments 1494 (under 6 and 7) and 2098 (under 8) it made it plain that the precedent set in Judgments 607 and 938, on which the complainant relies, must not be applied out of context; obviously, the Tribunal did not establish a rule whereby, whatever the circumstances, an official

who falls ill towards the end of his or her appointment is entitled to have it extended beyond the date of expiry and to receive a salary for the same term. It is equally plain that the principle set forth in Judgment 938, under 12, that “a staff member cannot be separated while on sick leave” must be seen in context; it cannot be extended to every case in which an appointment ends.’

17. The decision in Judgment 938 is to be distinguished from the present case in that, contrary to the FAO Rule that governed sick leave benefits in that case, UNIDO’s Staff Rule 108.03(e) specifically provides that ‘[e]ntitlement to sick leave shall lapse on the final date of a staff member’s appointment’. Given this provision, the claim that UNIDO was wrong to separate the complainant from its service before her health status was determined is unfounded.”

5. FAO’s Staff Rule 302.6.27 is similar to UNIDO’s Staff Rule 108.03(e), which is referred to in consideration 17 of Judgment 3604. Contrary to the complainant’s assertion in his second plea, he was not on certified sick leave at the time of the termination of his employment. This aspect of his second plea does not therefore fall within the scope of Manual paragraph 323.5.12, which relevantly states that “[i]f a staff member is on certified sick leave on the date of separation the effective date of separation will be extended until the end of his/her period of certified sick leave”. Accordingly, the complainant’s second plea is unfounded.

6. The complainant contends, in his third plea, that the Administration’s inconsistent application of FAO’s sick leave policy amounts to unequal treatment and resulted in a breach of the principle of the confidentiality of medical information in the course of the internal proceedings. An essential question is whether the FAO breached the complainant’s right to privacy by communicating his medical information to a third party without his consent, as he alleges.

7. Appendix A of FAO Manual section 340 states that all medical information is sensitive and confidential in nature and may be released only when required by law in accordance with international treaties applicable to the FAO. The complainant relies on consideration 7 of Judgment 2271 to support this aspect of his case. It states as follows:

“The confidential nature of medical information concerning the state of health of staff members constitutes a key element of their right to privacy. It is no doubt both necessary and legitimate for an international organisation, like any employer, to investigate requests for sick leave, to examine medical certificates and to have the health of its staff members checked by appropriate means. Such information should be gathered and processed on a fully confidential basis, however, and should never be communicated to third parties without the explicit consent of the person concerned. In the present case, the defendant is not wrong to point out that the three certificates, which have been included in the file on which the Tribunal must give a ruling, contain no information that in any way describes the disorders affecting or having affected the complainant. Nevertheless, in order to justify the change of post recommended by the authors of the three certificates, some precise details are given which the Tribunal considers are related to the complainant’s private life. The latter had at no stage been asked, however, if he consented to the information being divulged. The fact that the members of the Appeals Committee are bound by an obligation of confidentiality does not mean that information covered by medical secrecy can be disclosed to them without the consent of the persons concerned. Furthermore, the fact that the originator of the internal appeal, who had himself worked in personnel until he was transferred, could not have been unaware of the complainant’s health problems or of his own obligation to treat such matters confidentially, cannot in itself justify a breach of the guarantees to which international officials are entitled.” (Emphases added.)

8. The complainant states that the SMO breached his duty of confidentiality towards him by communicating private medical information, namely his medical certificates for the periods 12 to 14 August and 27 August to 15 September 2013, to the Director’s Office of the Human Resources Management Division and that the information was then, in breach of confidentiality, communicated to the Legal Office and its Legal Counsel, who passed it to the Appeals Committee, which included it in its report. That report was then further communicated to the Director-General.

9. It is observed that what purports to be a medical certificate for the period 12 to 14 August 2013 simply states that the complainant was unfit for work for that period. It is not dated and contains no confidential information as it does not state the nature of the injury or incapacity which rendered him unfit for work. It bears a signature but there is no

way of knowing to whom it belongs. It neither bears the name of an issuing medical practitioner or office or address. The certificate for the period 27 August to 15 September 2013 however contains this information and includes the nature of the incapacity. The SMO communicated these documents to the Human Resources Management Division as he was making a case for the complainant to receive compensation for sick leave. This was apparently under misapprehension of the fact that the complainant's appointment had been terminated on 19 August 2013 and that in the circumstances he was not entitled to sick leave for that period. Moreover, the complainant has sought to rely on the purported recommendation made by the SMO as the basis of his claim for compensation in this case. The Human Resources Management Division and the Legal Office used the documents to refute his claim. However, the complainant's confidentiality was breached when, without his consent, the certificate for the period 27 August to 15 September 2013, which mentioned the nature of his incapacity, was disclosed to the Appeals Committee with the FAO's reply in the internal appeal proceedings. The information it contained was then specifically repeated in the Appeals Committee's report to the Director-General. As a result, the Tribunal finds that the FAO breached the complainant's right to privacy when confidential medical information concerning the nature of his incapacity was passed to third parties. This aspect of the complaint is therefore well founded and the complainant will be awarded 5,000 euros moral damages in the circumstances.

10. However, the Tribunal finds no inconsistency in the FAO's application of the sick leave policy or that its application to the complainant amounted to "discriminatory unequal treatment". The complainant has failed to substantiate this claim.

11. The complainant's first plea states that the FAO breached the Staff Regulations as it failed to provide the compulsory exit medical examination. It is noted that Manual paragraph 343.1.21(a)(3) relevantly states as follows:

“Medical examinations are obligatory for [...] staff members prior to their separation. However, if a staff member cannot undergo the required medical examination prior to separation, they should undergo it not later than 30 days thereafter in the staff member’s own interest, in order not to forego the possibility of assessing the presence of any illness, condition or injury which might be service incurred.”

This provision provides, among other things, a safeguard for a staff member whose appointment with the FAO is being terminated against leaving without redress with an undetected service-incurred illness for which the staff member would be entitled to future compensation.

12. The evidence shows that the FAO requested the complainant to undergo the exit medical examination. He reported for it at the FAO’s Medical Unit in Rome on 27 August 2013. According to the complainant, the SMO did not proceed with the examination, having told him that he was unfit for separation from service, and advised him to consult a medical practitioner outside of the FAO. He informed the SMO that he had two medical certificates for the periods 12 to 14 August 2013 and 27 August to 15 September 2013, respectively. The SMO sent an e-mail to the complainant’s supervisor in which he confirmed his sick leave from 27 August to 15 September 2013. According to the complainant, the SMO further advised his supervisor that his separation date should be extended until the end of his certified sick leave and that his exit medical examination would be carried out at a later date. In response the Human Resources Management Division confirmed that his separation date was 19 August 2013.

13. In the first place, it is apparent that the SMO was unaware of the circumstances of the termination of the complainant’s employment. The evidence shows that he relented once the Human Resources Management Division informed him of the circumstances. There is no evidence that the complainant was ill at the date when his employment was terminated. The FAO did not fail to provide the complainant with the compulsory exit medical examination in breach of its regulations. The circumstances in which the medical examination was put on hold leads to the inference that the complainant contrived them. The complainant’s first plea is therefore unfounded.

14. As he succeeds in part, the complainant is entitled to costs, which the Tribunal sets at 400 euros.

DECISION

For the above reasons,

1. The FAO shall pay to the complainant moral damages in the amount of 5,000 euros.
2. The FAO shall also pay the complainant costs in the amount of 400 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 2 May 2017, 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 28 June 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ