

W. (No. 2)

v.

FAO

124th Session

Judgment No. 3882

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr H. W. against the Food and Agriculture Organization of the United Nations (FAO) on 15 September 2015 and corrected on 8 October 2015, the FAO's reply of 26 February 2016, the complainant's rejoinder of 4 April, corrected on 12 April, and the FAO's surrejoinder of 2 August 2016;

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 to dismiss him with immediate effect for misconduct.

The complainant joined the FAO in 2010 as Programme Officer at grade P-4, Field Security Service, under a three-year fixed-term appointment.

On Friday, 10 May 2013, the complainant's supervisor informed the Administration that during the mission he would carry out the following week the complainant would be acting as Officer-in-Charge (OIC) for the Field Security Service. In the morning of 17 May he sent an e-mail to the complainant stating that he would try to come to the office in the afternoon. Around noon the complainant replied that he was not feeling well and that he would "go home earlier" that day to

recover, to which the supervisor replied: “Well noted”. On 19 May the complainant submitted a request for uncertified sick leave for the full day of 17 May. As his request remained pending, he asked his supervisor on 26 June to reject it so that he could replace it with a request for annual leave.

By a memorandum of 28 June the complainant was informed that the Administration was in possession of evidence showing that he was absent from the office the entire day on 17 May, contrary to what he had asserted to his supervisor. In view of his position as OIC for the Field Security Service, his unauthorized absence and false statement were considered unacceptable. Consequently, the Deputy Director-General, Operations (DDO) recommended that the disciplinary measure of dismissal for misconduct be imposed on him. The complainant was requested to explain his whereabouts on 17 May 2013. In his reply the complainant admitted that he was not in the office on 17 May, but denied having made a false statement and claimed that his absence had been approved by his supervisor on that day. He also denied having been designated as OIC on 17 May and thus having responsibility for the “entire security function”. He concluded that the proposed measure was not in accordance with the FAO Administrative Manual.

After having met with the DDO on 31 July, the complainant received, on 19 August, a memorandum dated 13 August 2013 informing him that he was dismissed for unsatisfactory conduct, under Manual paragraph 330.2.41(b), effective immediately. The unsatisfactory conduct identified was the false statement and misrepresentation pertaining to official matters and the unauthorized absence from duty.

As his appeal to the Director-General against that decision was dismissed, the complainant lodged an internal appeal with the Appeals Committee, asking inter alia that the decision to dismiss him be set aside, that he be reinstated in his former post or in a post corresponding to his qualifications and training and that he be awarded material and moral damages. In the internal appeal proceedings the FAO produced documents in order to show that the complainant was in Sicily on 17 May. A majority of the Appeals Committee found that those documents had been obtained unlawfully and were thus inadmissible and that the complainant had been on annual leave on 17 May 2013.

The majority also found that there were obvious interpersonal issues between the complainant and his supervisor and that the decision to dismiss him was “disproportionately severe”. It recommended setting it aside. Two members wrote dissenting opinions recommending that the appeal be dismissed in its entirety.

By a letter of 22 July 2015, which bore the Director-General’s letterhead but was signed by the DDO, the complainant was informed that his appeal was rejected as unfounded. He was further informed that although the Director-General agreed with one minority opinion that the documents submitted in the internal appeal by the Administration were admissible, that issue was considered secondary as there was enough evidence to establish his unsatisfactory conduct. The Director-General considered that the complainant’s absence on 17 May 2013 was unauthorized, which constituted unsatisfactory conduct; that his actions fell short of the standards of loyalty and integrity expected of an international civil servant and that they seriously compromised the trust that the FAO had placed in him. Accordingly, the Director-General stated that the complainant’s dismissal was proportionate to his unsatisfactory conduct. That is the impugned decision.

The complainant asks the Tribunal to set aside the decision to dismiss him. He also asks to be reinstated with effect from 17 August 2013 under a continuing appointment with all the legal consequences that this entails or, alternatively, to be awarded material damages including an end of service indemnity and 2,000,000 euros in moral damages for the irreparable damage caused to his reputation and career. In addition, he claims 300,000 euros for emotional suffering, medical and legal costs, as well as punitive damages.

The FAO requests the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant contends that the FAO acted unlawfully when it dismissed him for misconduct with effect from 19 August 2013. The impugned decision of 22 July 2015 confirmed that decision.

The FAO's explanation for the dismissal was stated from the outset in a memorandum of 28 June 2013. That memorandum informed the complainant of the proposal to take the disciplinary measure against him (the proposal memorandum). The explanation was restated in the memorandum dated 13 August 2013 (the dismissal memorandum), in the letter of 20 December 2013 rejecting his appeal to the Director-General and in the impugned decision. The explanation is that the complainant was dismissed for unauthorized absence from work on 17 May 2013 when he was the Officer-in-Charge (OIC) for the Field Security Service. Additionally, that he made false statements as to the reason for taking that leave and deliberately misled the FAO by falsely suggesting that he was at work on that day when he was in fact absent from work for the entire day without authorization. The explanation further states that these circumstances were aggravated by the fact that on 17 May 2013 he was the OIC for the Field Security Service and, as such, in charge of its field security. That role was critically important to the safety of FAO staff in the field. His actions therefore put the staff in the field at risk. Those events, according to the explanation, constituted unsatisfactory conduct as defined by Manual paragraphs 330.1.51 and 330.1.52, which warranted dismissal for misconduct as defined in Manual paragraph 330.2.41(b), in that the complainant's conduct fell short of the standards of loyalty and integrity expected of an international civil servant, seriously compromising the trust that the FAO had placed in him, and his dismissal was a proportionate disciplinary measure.

2. The complainant challenges the impugned decision on procedural and substantive grounds. He insists that he was on uncertified sick leave for the entire day on 17 May 2013. He further states that uncertified sick leave is an automatic entitlement which requires no approval and that it was authorized as he had requested it. He insists that he did not make a false statement concerning the reason for taking the uncertified sick leave and that, in any event, dismissal as a disciplinary measure was disproportionate. In addition to the setting aside of the impugned decision, the complainant seeks to be reinstated under a continuing appointment with all the legal consequences that this entails.

Alternatively, he seeks an award of compensation and the payment of an end of service indemnity, damages under various heads and costs.

3. The main procedural ground in the complaint is that the FAO breached the procedures governing disciplinary measures provided for in Manual section 330. Manual paragraph 330.1.3 states that the purpose of disciplinary measures is to protect the integrity and efficiency of the FAO. It however further states that such measures are not to be imposed without a thorough investigation of the facts and without affording the staff member concerned an opportunity to state her or his case to the responsible officer. Staff Rule 303.0.1 empowers the Director-General to impose disciplinary measures, including dismissal for misconduct, on staff members whose conduct is unsatisfactory. This is repeated in Manual paragraph 330.1.31.

4. The FAO followed the formal disciplinary procedure of Manual paragraph 330.3.2 in this case and the complainant does not dispute that the procedural steps set out therein were followed. The DDO, as the initiating officer, issued the proposal memorandum of 28 June 2013, to which the complainant replied with his comments by letter dated 29 July 2013. The DDO met with the complainant and discussed the matter on 31 July 2013. The Director, Office of Human Resources (OHR), issued the dismissal memorandum dated 13 August 2013. The Tribunal is satisfied that, contrary to his contentions, the complainant was accorded the right to respond to the allegations made against him and that he had the opportunity to state his case to the responsible officer pursuant to Manual paragraph 330.1.3. These pleas therefore fail, as does his further plea that the allegations against him were not properly investigated, in breach of Manual paragraph 330.1.3. The Tribunal finds that the complainant's right to due process was generally accorded under the provisions of Manual section 330.

5. The complainant alleges that the FAO breached Manual paragraph 330.4 because the Director-General failed to establish an Internal Investigatory Committee to advise him in the disciplinary proceedings. He submits that at no stage in those proceedings was an

independent committee established to investigate the circumstances of the alleged offence. He also states that he was never interviewed by an Internal Investigatory Committee, that he never received an investigation report and that he was not given an opportunity to respond to the findings of such a report.

6. Staff Regulation 301.10.1 states that “[t]he Director-General may establish an administrative machinery with staff participation which will be available to advise him in disciplinary cases”. This provision is directory rather than mandatory. So also is Manual paragraph 330.4.1, which provides the purpose of the Internal Investigatory Committee. It states that, in accordance with Staff Regulation 301.10.1, the Director-General may establish, on a provisional basis, an Internal Investigatory Committee whose functions shall be of an advisory nature and which shall assist him, upon his request, in discharging his responsibilities in relation to the cases brought to his notice and involving a staff member’s conduct and activities. It was within the Director-General’s discretion whether or not to establish an Internal Investigatory Committee. He did not breach Manual paragraph 330.4 or any other staff rule by not establishing one for the present case. This ground is therefore unfounded.

7. The complainant also contends that the decision to dismiss him was tainted by a biased disciplinary process. He submits that this is substantiated by four steps. The first was that “[o]n 28 June 2013, the DDO made accusations against [him] by submitting a memo to the [Director, OHR] proposing to impose on [him] the disciplinary measure of dismissal”. The Tribunal observes that this action was within the DDO’s purview under the FAO’s internal rules. The second step was that “[o]n 29 July 2013, in a face-to-face discussion with [him] the DDO reviewed information on this case provided by [the complainant] to clarify [the] allegations”. The Tribunal notes that this reference was to the complainant’s response to the DDO’s proposal letter.

The third step was that “[b]y letter dated 13 August 2013, the DDO repeated charges against [him] and the disciplinary measure of dismissal for misconduct was imposed on [him]”. The Tribunal notes that this reference was to the dismissal memorandum to the complainant, but

that it was written and signed by the Director, OHR, and not by the DDO. The complainant's suggestion, in effect, is that the Director, OHR, wrote it under dictation by the DDO. However, this is unsubstantiated. The fourth step was that "[b]y letter dated 22 July 2015, the DDO made a final decision on the appeal by rejecting [the] conclusions and recommendations of the Appeals Committee". This is a reference to the impugned decision of the Director-General on whose behalf the DDO signed.

The Tribunal finds that the foregoing circumstances show no bias by the DDO against the complainant, as he contends. Neither has the complainant substantiated his case of bias against the Director, OHR. The allegation of bias is therefore unfounded, as is the complainant's allegation that the FAO failed in its obligation to provide reasons for the proposal to dismiss him in the memorandum of 13 August 2013, as adequate reasons are stated therein.

8. The complainant's assertion that the FAO used documentary evidence obtained in breach of his fundamental right to respect for his private life as a former employee concerns documents relating to the registration and transfer, including the certificate of ownership, of a motor vehicle which he purchased in Sicily and related documents. The FAO relies on those documents as evidence that the complainant was not in Rome on 17 May 2013, but in Sicily where he purchased the vehicle on that date. The complainant provides a copy of an airline ticket which shows a return schedule from Sicily arriving in Rome at 8:25 that morning.

9. As far as the admissibility of the documents is concerned, the Tribunal's case law states that its practice is to consider any items that are material to a case, but that it will not use a confidential document to the complainant's detriment unless she or he had the opportunity to see it beforehand (see Judgment 2062, under 5). It has further stated that an item which is material to a case will be admissible unless it was obtained by deceit, or its authenticity is in dispute (see Judgment 1637, under 6). The complainant does not challenge the authenticity of the documents and there is no evidence that they were obtained by deceit.

Moreover, the documents are material to the case as part of the account of the complainant's possible whereabouts and activity on 17 May 2013. The fact that they were produced only at the stage of the proceedings before the Appeals Committee was merely an incident of the ongoing investigation of the case and the complainant had the opportunity to see them beforehand. The Tribunal therefore finds that the documents are admissible and that the FAO did not breach the complainant's right to respect for his private life. Accordingly, this ground is unfounded.

10. There are two other grounds in the complaint which arose out of or after the Appeals Committee's proceedings. In the first ground the complainant claims that the impugned decision did not state reasons for departing from the recommendations of the majority of the Appeals Committee. In the second ground he contends that the report of the Appeals Committee as a whole is tainted because it contained minority reports in breach of the rules. These grounds are unfounded. First, the impugned decision adequately states the Director-General's reasons for not accepting the recommendations of the majority of the Appeals Committee. In the second place, Manual paragraph 303.1.37 permits dissenting opinions to be included in the Appeals Committee's report by relevantly stating as follows:

“The Committee shall by majority vote adopt and submit a report to the Director-General. The report shall be considered as constituting a record of the proceedings in the appeal, and may include a summary of the matter as well as the Committee's recommendation. Any member of the Committee may have a dissenting opinion included in the report. [...]”

11. The Tribunal rejects also the complainant's plea that the impugned decision is tainted because the DDO signed it when he had no authority to do so. The question on this is not one of delegated authority. The Tribunal notes that the decision bore the Director-General's letterhead albeit that the DDO signed it. Additionally, the memorandum states that the decision was taken by the Director-General and the DDO merely signed the memorandum on his behalf. As was stated in Judgment 3177, under 12, it is not a matter of who signed the decision but who made it and the Tribunal is satisfied that the impugned decision was the decision of the Director-General.

12. Given that the FAO's system for the adjudication of challenges to administrative decisions essentially commences with the filing of an appeal to the Director-General and may culminate in a complaint to the Tribunal, which is an independent court of justice, the Tribunal finds unfounded the ground that the FAO failed to ensure his right to a fair system to adjudicate his case.

13. As a precursor to considering the substantive challenges to the impugned decision, the Tribunal recalls its consistent case law as to the scope of its review powers in a disciplinary case as stated, for example, in consideration 6 of Judgment 3757:

“[I]t is not the Tribunal's role to reweigh the evidence collected by an investigative body the members of which, having directly met and heard the persons concerned or implicated, were able immediately to assess the reliability of their testimony. For that reason, reserve must be exercised before calling into question the findings of such a body and reviewing its assessment of the evidence. The Tribunal will interfere only in the case of manifest error (see Judgments 3682, under 8, and 3593, under 12).”

14. It is settled principle that the organization must prove its case against a complainant in a disciplinary matter such as this beyond a reasonable doubt. The complainant argues that the FAO did not meet that standard of proof in the present case. The Tribunal's approach when this issue is raised was stated, for example, in consideration 14 of Judgment 3649, as follows:

“At this juncture, it is useful to reiterate the well settled case law that the burden of proof rests on an organization to prove the allegations of misconduct beyond a reasonable doubt before a disciplinary sanction is imposed. It is equally well settled that the ‘Tribunal will not engage in a determination as to whether the burden of proof has been met, instead, the Tribunal will review the evidence to determine whether a finding of guilt beyond a reasonable doubt could properly have been made’ (see Judgment 2699, consideration 9).”

15. In the main substantive ground, the complainant claims that the decision to dismiss him is tainted by various breaches and misapplications of FAO's Staff Rules, his contract and United Nations rules. He insists that he was thereon dismissed for exercising his legally protected right to take sick leave.

16. The FAO has at every stage relied on Manual paragraphs 330.1.51 and 330.1.52, which define unsatisfactory conduct, and Manual paragraph 330.2.41(b), which explains the grounds on which a staff member may be dismissed for misconduct. The non-exhaustive list of examples of unsatisfactory conduct set out in Manual paragraph 330.1.52 includes “(c) False statement, misrepresentation or fraud, whether oral or written, pertaining to official matters. [...] (f) Wilful acts that endanger lives [...] (j) Conduct which renders the staff member unable to perform his/her duties properly, for example [...] unauthorized absence from duty”.

17. On the face of it, there may appear to be no falsity in the complainant’s e-mail statement to his supervisor at 11:58 on the morning of 17 May 2013 that he was “not feeling well and got some medicine” as “[a]pparently, [he] ha[d] caught a flu” and “will go home earlier [...] to recover”. However, the surrounding circumstances suggest otherwise. The statement that he apparently caught the flu was not in affirmative terms. The complainant provides no evidence that he did. He had sent the foregoing statement having had the earlier exchange of messages at 8:27 and 9:08 on that morning with the Chief of the Security Services Division (CSDU), his supervisor. In the last message the Chief of CSDU, who had returned from mission, had indicated that he would try to come into the office later that day. He was scheduled to be out of the office from 11 to 20 May 2013. During that period the complainant was designated as OIC for CSDU/Field Security. The complainant had purchased a motor vehicle in Sicily and was there to sign for the transfer of ownership on 17 May 2013. The complainant subsequently accepted that he was in Sicily, but provides an airline ticket showing his return flight from Sicily to Rome was scheduled for 7:10 on the morning of 17 May 2013 to arrive in Rome at 8:25 that morning. This, however, is not evidence of the time of his actual travel.

The complainant had left the office in Rome at 5:15 on the afternoon of 16 May 2013. He provided a doctor’s note and a visitor’s chart to confirm that he was absent from work on 17 May 2013 for a valid medical reason. The FAO doubts the authenticity of these documents on the grounds that they do not show who prepared the information

entered therein; they seem to have been issued by the office of an orthodontist for pain in the temporomandibular joint; they do not show whether the information therein relates to the complainant; they do not show whether they were prepared on or refer to a medical consultation on 17 May 2013 and they do not contain information confirming that the complainant had caught the flu. These circumstances caused the FAO to conclude that the statement which he made concerning his illness on the subject day was not genuine or authentic and that, while the complainant did not actually state that he was in the office and was leaving earlier to go home to recover, the statement was worded to convey that impression. In these circumstances, the Tribunal finds that the FAO could properly have concluded, as it did, that the subject statements which the complainant made were false.

18. The complainant however submits that in any event he did not have to submit a medical certificate to support his request for uncertified sick leave as that type of leave is automatic as a legally protected right which does not require any authorization. He states that, under the FAO Manual and other United Nations rules, uncertified sick leave is defined as absence of up to seven working days during the annual leave cycle for which no doctor's note or any other document is required but that he provided the doctor's note and personal visitor's chart simply to show that he was absent on 17 May 2013 for a medically certified reason. He insists that under the applicable rules the approval or authorization of uncertified sick leave is not within the discretion of his supervisor but is automatically and immediately authorized upon the entry of the leave request into the electronic system. He argues that his supervisor's rejection of his request for uncertified sick leave "constitutes a grossly negligent dereliction of his supervisor duties and [...] an abuse of authority", while FAO's procedures, which permit such rejection, reflect flaws in its systems amounting to discriminatory and unequal treatment. The Tribunal's view is that the complainant is mistaken. As will become clear from the discussion that follows, there is a request and approval requirement for uncertified sick leave, which put its authorization within the purview of a supervisor.

19. Staff Regulation 301.6.2 mandates the Director-General to establish a scheme of social security for the staff, including provisions for health protection and sick leave, among other things. Staff Rule 302.6.216 relevantly provides that no member of staff shall be granted sick leave for more than three consecutive working days without producing a medical certificate of incapacity from a qualified medical practitioner. The complainant submits that a staff member is entitled to sick leave in accordance with Manual paragraph 323. It is noted that Manual paragraph 323.1.2 provides definitions for “Certified sick leave” and for “Uncertified sick leave”. Manual paragraph 323.1.22 relevantly defines the latter as follows:

“Uncertified sick leave is sick leave which is not supported by a medical certificate. It may be granted for a maximum of three consecutive working days at a time. Absences for uncertified sick leave [...] shall not exceed seven working days in any period of 12 consecutive months. Any days taken in excess are charged to annual leave.”

20. However, this does not mean that uncertified sick leave is an automatic right. According to Manual paragraph 323.1.41, requests for uncertified sick leave are referred to and signed by the division director concerned, or a designated officer, if the conditions set out in Manual paragraph 323.1.22 are met. Under Manual paragraph 323.3.11, “[s]taff members shall request sick leave in writing on the appropriate form as soon as possible after the onset of an illness but in any event not later than the end of the fourth working day following the initial absence from duty”. Moreover, FAO’s Intranet guidelines governing sick leave state as follows:

“When possible, staff members must request [uncertified sick] leave in advance via a Leave request recorded in Global Resources Management System (GRMS). In case of unexpected absence for family-related emergency as illness of a child, staff must advise their supervisor as soon as possible of their absence and request the leave via the Leave module in GRMS upon their return to duty.”

21. The complainant returned to the office on Sunday 19 May 2013 and made the request for uncertified sick leave by that method. The Tribunal finds that his supervisor had the purview to reject that request,

as he did, because he thought that it was not genuine. Moreover, as his immediate supervisor, he was responsible for investigating, pursuant to Manual paragraph 314.3.3, the complainant's unauthorized absence from work on 17 May 2013. The complainant's uncertified sick leave for that day was unauthorized. In the foregoing circumstances, the Tribunal determines that the FAO did not err in finding that there was evidence establishing beyond a reasonable doubt that the complainant's conduct was unsatisfactory and that it amounted to misconduct for which a disciplinary measure could have been imposed. These aspects of the substantive ground of the complaint are therefore unfounded.

22. The complainant contends that his dismissal as a disciplinary measure is completely disproportionate to the allegations against him. The Tribunal however determines that given the evidence and circumstances of this case, it was not disproportionate for the FAO to take the disciplinary measure of dismissal against the complainant. Accordingly, this ground of the complaint is also unfounded. Consequentially, so is the complainant's further plea of abuse of authority by his supervisor and the DDO for their actions in the disciplinary process. His pleas of discriminatory and unequal treatment are also unfounded as the complainant has provided no evidence to substantiate them.

23. The complainant alleges that inter-personal issues between him and his supervisor escalated into a campaign of defamation against him. However, he has not substantiated this allegation. Neither has he substantiated his further allegation that he was harassed and mobbed. He did not follow the internal procedures for lodging a formal complaint. Neither has he substantiated his allegation that serious procedural flaws in the course of the disciplinary proceedings amounted to harassment. Accordingly, these grounds of the complaint are unfounded.

24. The complainant contends that he was dismissed without the observance of due process. The Tribunal's case law states as follows in Judgment 3137, consideration 6:

“A staff member is entitled to due process before a disciplinary sanction is imposed. In this regard, he or she must be given, at the very least, an opportunity to test the evidence on which the charges are based, to give his own account of the facts, to put an argument that the conduct in question does not amount to misconduct and that, even if it does, it should not attract the proposed sanction (see Judgments 2254, consideration 6, and 2475, consideration 22).”

The Tribunal finds no evidence that due process was not observed as the complainant alleges. Accordingly, this claim is unfounded.

25. In the foregoing premises, the complaint will be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 12 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