

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**P. (No. 3)**

**v.**

**FAO**

**126th Session**

**Judgment No. 4013**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr W. P. against the Food and Agriculture Organization of the United Nations (FAO) on 19 April 2016 and corrected on 9 June, the FAO's reply of 29 September, corrected on 4 October, and the email of 24 October 2016 by which the complainant informed the Registrar of the Tribunal that he did not wish to file a rejoinder;

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 decision not to investigate his harassment complaint in accordance with the applicable rules.

At the material time the complainant worked as Information Management Officer within the FAO. In January 2013 he filed a harassment complaint with the Director of the Office of Human Resources (OHR) against a colleague, Ms T., on the grounds that he had been informed that emails written by Ms T. containing criticism of him or his performance were stored in an email folder accessible to all users of the FAO's IT network. On 13 February 2013 the Deputy Director-General for Operations wrote to the Office of Inspections and Investigations

(OIGI) of the World Food Programme (WFP) asking for its assistance because of a possible conflict of interest if the matter was referred to the FAO Investigation Panel as foreseen under Administrative Circular No. 2007/05 on harassment (hereinafter “the Circular”). The complainant was the President of the Association of Professionals in the FAO, a body that proposed candidates to be appointed as members of the Investigation Panel and he was a member of that Panel himself. On 12 June 2013 the WFP OIGI issued a report entitled “Preliminary Review” of the harassment complaint, in which it recommended that the matter be closed as there were no reasonable grounds to warrant a full investigation. On 18 June the Deputy Director-General for Operations forwarded the report to the complainant and the alleged harasser for comment.

The complainant replied to the Deputy Director-General for Operations on 4 July 2013 that the recommendation in the report was based on a preliminary review, which was not binding on the FAO. He requested that a “proper” investigation be undertaken by the FAO Investigation Panel in accordance with the Circular and the Rules of Procedure of the Investigation Panel. The Deputy Director-General for Operations rejected his request on 4 September 2013 and stated that the matter would be submitted to the Director of OHR for her consideration. The Director informed the complainant on 8 October 2013 that the recommendation of the WFP OIGI would be followed and that the harassment complaint would be closed.

The complainant appealed to the Director-General on 2 December 2013, asking him to review the decision of 4 September 2013 and award him damages. His appeal was dismissed on 13 January 2014. On 10 February 2014 he lodged an appeal with the Appeals Committee contesting the decisions of 4 September and 8 October 2013 denying his request for a “proper investigation” of his harassment complaint by the FAO Investigation Panel. He argued that the FAO had acted in breach of existing administrative provisions, that his right to defend himself had been breached and that he had suffered significant stress by this denial of justice. He asked that the contested decisions be set aside,

that his harassment complaint be investigated by the FAO Investigation Panel and that he be awarded at least 10,000 euros in damages.

The complainant retired in June 2014. On 1 September 2015 the Appeals Committee issued a majority and a minority opinion. The majority noted that the Circular was silent regarding the handling of cases where the investigation by the FAO Investigation Panel might be tainted by a potential bias or a conflict of interest. It also noted that the complainant had objected to the referral of his harassment complaint to the WFP OIGI only after he had been requested to provide his views on the investigation report. The majority concluded that the FAO's decision to refer the matter to the WFP OIGI was legitimate in light of the potential risk of conflict of interest or bias. In its view, the investigation conducted by the OIGI was thorough and objective, and further investigation was not necessary. The majority therefore recommended dismissing the appeal.

The minority found that the FAO had no valid grounds to presume that the FAO Investigation Panel would be partial. The FAO had breached the Rules of Procedure of the Investigation Panel, established by the Circular, by not referring the harassment complaint to the competent authority, that is to say the FAO Investigation Panel. It observed in particular that the matter had been looked into more than three months after the complainant had complained of the fact that defamatory emails had been published and made accessible to a large number of staff, and that the FAO had provided no evidence to the Appeals Committee that corrective action had been taken. It recommended that the complainant be granted full redress and that he be compensated for the moral injury suffered.

By a letter of 27 January 2016, which the complainant received on 2 February, the Director-General informed him that he agreed with the findings and recommendation of the majority of the members of the Appeals Committee to dismiss the appeal. That is the decision the complainant impugns before the Tribunal.

The complainant asks the Tribunal to award him 10,000 euros in damages, together with "moral damages for the delay in the internal complaint and appeals process".

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

### CONSIDERATIONS

1. This complaint arises from the FAO's referral of the complainant's harassment complaint against Ms T. to the WFP Office of Inspections and Investigations (OIGI), for investigation. In his 13 February 2013 memorandum to the WFP's Inspector-General, the Deputy Director-General for Operations explained that "recourse to the [FAO] Investigation Panel would lead to a situation of conflict of interest" having regard to the Association of Professionals' role in the appointment of members of the Investigation Panel coupled with the fact that the complainant was the President of the Association and that he was also a member of the Investigation Panel.

2. On 18 June 2013, the complainant was given a copy of the OIGI's report "Preliminary Review of Harassment Complaint against [Ms T.], FAO" for comment. In the report, the OIGI recommended that the complaint be closed as there were no reasonable grounds to warrant a full investigation. In response, the complainant requested that a "proper" investigation be undertaken by the FAO Investigation Panel into his harassment complaint against Ms T. in accordance with the provisions of the Circular and the Rules of Procedure of the Investigation Panel. The FAO denied the request and the complainant filed an internal appeal against the rejection of his request.

3. In the 27 January 2016 decision impugned in this complaint, the Director-General endorsed the Appeals Committee's majority opinion that the referral of the harassment complaint to the WFP OIGI "was legitimate and that the Organization [had] conducted an objective, impartial and fair investigation in accordance with the relevant provisions set forth in [the Circular] and general principles of law".

4. The complainant's main contention is that the way his harassment complaint was investigated constituted a violation of the provisions in the Circular. In summary, he submits that a "preliminary

review” cannot be a substitute for a proper investigation by the FAO Investigation Panel. Moreover, there is no provision in the Circular for a preliminary review of a harassment complaint, let alone, as an option in the place of a full investigation. He argues that he was denied his right to justice as a result of the FAO’s failure to investigate his complaint of harassment according to the terms of the Circular. He also submits that he was denied the same right and procedure as granted to his colleagues.

5. The FAO submits that it discharged its duty of care to the complainant. The FAO claims that in keeping with the Tribunal’s relevant case law, due consideration was given to the harassment complaint; the investigation was conducted in a thorough, fair and objective manner; and due process was observed throughout the investigation. The FAO also maintains that the complaint was investigated in accordance with the applicable rules and procedures.

6. In support of the latter assertion, the FAO points out that the investigation of the harassment complaint was conducted by professional and experienced investigators from another United Nations organization “who were fully aware of the applicable rules and procedures and the context in which the complaint was made”. The FAO also notes that the OIGI in its report states that the applicable rules are the FAO Circular and the Rules of Procedure of the Investigation Panel; the conclusion in the report was based on the definition of harassment in the Circular; and the investigators were well aware that the FAO standards of behaviour are those of the international civil service and applied those standards. As to the methodology employed by the OIGI in the investigation, according to the investigation report, the OIGI considered the provisions of the Uniform Principles and Guidelines for Investigations 2<sup>nd</sup> Edition; the WFP Investigations Manual; the FAO Guidelines for Internal Administrative Investigations by the Office of the Inspector-General; and the Rules of Procedure of the Investigation Panel provided for in the Circular.

7. In response to the complainant's assertion that the investigative process in the Circular did not include a "preliminary review", the FAO observes that as an Investigation Panel member the complainant would be aware that in the past the Investigation Panel had conducted preliminary reviews in several harassment complaints without objection being raised by either the complainant or the respondent. Moreover, as provided in the Uniform Principles and Guidelines for Investigations, professional investigators commonly conduct preliminary evaluations of harassment complaints to determine the complaint's "credibility, materiality, and verifiability" and consider "whether there is a legitimate basis to warrant an investigation". As well, this approach is also found in the FAO Guidelines for Internal Administrative Investigations and the WFP Investigations Manual. Further, in these circumstances, the fact that the investigation of the harassment complaint was conducted by WFP investigators could not be viewed in any way as prejudicial to the complainant as the rules and procedures were those applicable to professional investigators of international organizations including the FAO.

8. In support of its position, the FAO relies on Judgment 3065 where, in consideration 10, the Tribunal stated:

"[...] an accusation of harassment requires that 'an international organisation both investigate the matter thoroughly and accord full due process and protection to the person accused'. Furthermore, '[i]ts duty to a person who makes a claim of harassment requires that the claim be investigated both promptly and thoroughly, that the facts be determined objectively and in their overall context [...], that the law be applied correctly, that due process be observed and that the person claiming, in good faith, to have been harassed not be stigmatised or victimised on that account [...]' (see Judgment 2973, under 16, and the case law cited therein)."

However, as the Tribunal stated in Judgment 3365, under 26, it is also well settled in the case law that "when an official makes allegations of harassment, she or he is entitled to have them dealt with in accordance with the rules and procedures in force (see Judgment 2642, under 8)". In the same consideration, the Tribunal held that "[i]f an organisation fails to do so, it breaches not only its own policies and rules, but also its duty of care towards the official".

9. Contrary to the FAO's assertions, it did not adhere to the rules applicable to the investigation of a harassment complaint provided in the Circular. It does not follow from the fact that the OIGI based its conclusions on the FAO's definition of harassment in the Circular, that the investigation was conducted in accordance with the FAO's rules. It is observed that a "preliminary review" as conducted by the WFP OIGI did not form part of the investigation process in the Circular. As well, in contrast with the OIGI's process in which a recommendation is included in its report, the provisions in the Circular limit the Investigation Panel's report to the Director of OHR to its findings of fact. Further, the fact that the Investigation Panel had conducted "preliminary reviews" in its consideration of several harassment complaints without objection; that professional investigators commonly do preliminary evaluations of these types of complaints; and that this approach is recognized in the FAO Guidelines for Internal Administrative Investigations by the Office of the Inspector-General and the WFP Manual does not absolve the FAO of its obligation to deal with these complaints in accordance with the procedure provided in its own rules.

10. It is recognized that the FAO was confronted with a situation not contemplated in the Circular, that is, at a minimum, a perceived conflict of interest for all members of the Investigation Panel. And, at the same time, the FAO was obliged to deal with the complainant's harassment complaint promptly, thoroughly, and objectively in accordance with the case law. In the case of formal complaints, the Circular requires, among other things, that if the responsible Director decides that an investigation into the facts is warranted, the complaint must be referred to the Investigation Panel. The applicable procedure following a referral is found in Section II(b)(iv) of the Circular. In addition to the procedure for the conduct of an investigation, Section II(b)(iv)(a) relevantly provides that "[e]ach complaint will be investigated by an Investigation Panel composed of three persons chosen from the three Members and six Alternates [...] appointed by the Director-General". Given that the mandate of the FAO Office of the Inspector-General did not include the investigation of harassment complaints, the FAO should have instructed

the investigators to conduct the investigation in accordance with the provisions in the Circular.

11. However, according to the WFP OIGI report, the OIGI and the Director of OHR (FAO) met on two occasions prior to the start of the investigation to discuss “the scope of the preliminary review, as well as to request for information on staff members”. The FAO Inspector-General also attended the last of the two meetings. Thus, it is evident that from the outset, the FAO Director of OHR and the FAO Inspector-General were in agreement with a “preliminary review” of the harassment complaint, a process not contemplated in the Circular. This, coupled with the fact that it does not appear that the FAO and the OIGI engaged in any discussion about the investigation being conducted in accordance with the provisions in the Circular, shows a disregard on the part of the FAO of the obligation to follow its own rules.

12. Although the FAO breached its obligation to deal with the harassment complaint in accordance with the applicable rules in the Circular, the complainant has not established that he was prejudiced as a result of the FAO’s action. Moreover, his claim that because of his membership on the Investigation Panel and his role as President of the Association of Professionals he was “single[d] out” and denied the same right and procedure as would be granted to his colleagues is also rejected. His complaint was referred to the WFP because of the conflict of interest problem and for no other reason.

13. Returning to the internal appeal, the Appeals Committee majority observed that there was no evidence that “OIGI conducted the investigation in a different manner than the way an investigation is undertaken by the FAO Investigation Panel”, and concluded that the OIGI’s investigation was “undertaken in compliance with the applicable rules specified [in the preceding paragraph – the Circular and the Rules of Procedure of the FAO Investigation Panel]”. As this conclusion constitutes an error of law, the Director-General’s decision endorsing the majority opinion is tainted by the same error of law and will be set aside. The complainant is entitled to moral damages for the FAO’s breach



of its duty of care in the amount of 1,000 euros. The complainant did not seek, by way of relief, that the matter be remitted to the FAO to enable further investigation to be conducted in accordance with applicable procedures.

14. Lastly, in the complaint form submitted to the Tribunal, the complainant seeks “moral damages for the delay in the internal complaint and appeals process”. As the complainant did not make any submissions in his brief in relation to this claim, it will not be considered. It is also observed that in his brief, the complainant attempted to incorporate by reference his pleading in the internal appeal process. The Tribunal has on many occasions stated that it is not acceptable to incorporate by reference into the pleadings before the Tribunal arguments, contentions and pleas found in documents created for the purposes of internal review and appeal (see Judgment 3920, under 5, and judgments cited therein). Accordingly the Tribunal did not have regard to those documents.

#### DECISION

For the above reasons,

1. The Director-General’s 27 January 2016 decision is set aside, as is the decision of 13 January 2014.
2. The FAO shall pay the complainant moral damages in the amount of 1,000 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 17 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ