

**P. (No. 4)**

**v.**

**FAO**

**126th Session**

**Judgment No. 4014**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr W. P. against the Food and Agriculture Organization of the United Nations (FAO) on 24 December 2016, the FAO's reply of 25 April 2017 and the email of 22 June 2017 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 to investigate his harassment complaint by an external investigator and not by an investigation panel provided for in the applicable rules.

The complainant worked at the material time as Information Management Officer within the FAO. In January 2013 he became aware that some emails criticising him or his performance were stored in an email folder accessible to all users of the FAO's IT network. On 16 December 2013 he filed a harassment complaint with the Director of the Office of Human Resources (OHR) against his former supervisor, Mr M., on the grounds that Mr M.'s name was mentioned twice in the emails, which left no "doubts as to the source of th[e] false allegations

and point[ed] to a plot against [him] mounted by the very [Mr M.]”. He added that the way he had been “micro-managed” by Mr M. was an act of harassment and provided examples.

On 24 December 2013 the Director of OHR informed the complainant that the complaint would be forwarded to Mr M. for comment in accordance with Administrative Circular No. 2007/05 on harassment (hereinafter “the Circular”). When the complainant subsequently enquired as to the status of his harassment complaint, the Director of OHR informed him on 1 April 2014 that arrangements had been made for an investigation to be undertaken by an external professional investigator, Mr T. On 3 April the complainant asked the Director of OHR to reconsider her decision and to have the harassment complaint investigated by the FAO Investigation Panel. She rejected his request, explaining that it would not be appropriate to refer the matter to the Investigation Panel given that he was a longstanding member of the Panel and that the members of the Panel were nominated by the Association of Professionals in the FAO, of which he was the President.

The complainant appealed that decision with the Director-General on 10 April 2014. He asked him to order an investigation by the Investigation Panel in accordance with the Circular and to award him compensation for the “repeated denial of justice”, which had caused him significant stress and damage to his health. By a letter of 26 May 2014 the complainant was notified of the decision of the Director-General to reject his appeal.

On 24 June 2014 the complainant lodged an appeal with the Appeals Committee against the decision of 26 May. In the meantime, on 30 May 2014, the external investigator issued his report. He concluded that there was no evidence of harassment. The report was forwarded to the complainant, who was asked to provide his comments. He did so on 26 June 2014, shortly before retiring later that month.

In its report of 15 September 2016, the Appeals Committee noted that the Circular was silent in the case of an investigation involving a potential conflict of interest or bias, but it also noted that the FAO had an obligation to ensure that all allegations of harassment were fully, fairly and promptly dealt with in a confidential manner. It therefore

concluded that the FAO had complied with the Circular to the best extent it could in order to ensure that the investigation was objective, impartial and fair. The Appeals Committee examined the report of the external investigator and observed that, although the investigator had included a detailed description of the facts, the complainant's views had not been taken into account. Indeed, he had refused to interact with the external investigator. The Appeals Committee questioned some aspects of the external investigation and expressed some doubts as to the way the external investigator had been selected. It nevertheless concluded, with strong reservations from one member, that the investigation should not be declared null and void as the complainant had been invited to cooperate with the external investigator and to comment on the final report of the investigator. It therefore recommended dismissing the appeal.

By a letter of 14 November 2016, which the complainant received on 28 November, the Director-General informed him that he agreed with the recommendation of the Appeals Committee to dismiss the appeal. That is the decision impugned 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. On 16 December 2013 the complainant filed a harassment complaint against his former supervisor. In response to his inquiry concerning the status of this complaint, the Director of OHR informed the complainant that arrangements had been made for an external investigator, Mr T., to conduct the investigation into his complaint and that Mr T. would contact him. The complainant advised the Director of OHR of his objection to the use of an external investigator and asked for a reconsideration of that decision and that the Investigation Panel conduct the investigation into his harassment complaint. The Director of OHR replied that the harassment complaint could not be investigated by the Investigation Panel. She explained that it would not be "appropriate"

for the Panel to investigate his complaint as he was a longstanding member of the Panel and its members are nominated by the Association of Professionals of the FAO of which he was the President. In view of his position regarding the lawfulness of the referral of his complaint to an external investigator, the complainant refused to have any interaction with Mr T.

2. Subsequently, the complainant lodged an internal appeal challenging the decision to have his harassment complaint investigated by an external investigator rather than by the Investigation Panel in accordance with the provisions of the Circular. In the 14 November 2016 decision impugned in this complaint, the Director-General accepted the Appeals Committee's conclusion that "in view of the potential conflict of interest arising from [the complainant's] role as a member of the Investigation Panel and President of the [Association of Professionals in the FAO], the referral of [his] complaint of harassment was necessary to ensure an '*objective, impartial and fair* [investigation] *throughout*' the investigation, thereby preserving due process for both parties" and dismissed the appeal.

3. Before considering the parties' submissions, some additional background is useful. In Judgment 4013 also delivered in public today, the Tribunal considered another complaint against the FAO filed by the same complainant, which also concerned the investigation of a harassment complaint filed by him. In that case, the fact giving rise to the complaint before the Tribunal was also the FAO's referral of the investigation of the harassment complaint to an external investigator rather than to the Investigation Panel to avoid a conflict of interest. As noted above, in the present case, the FAO also referred the complainant's second harassment complaint to an external investigator for the same reason.

4. The main issue in this complaint is whether, as the complainant contends, the referral of his harassment complaint to an external investigator and not to the Investigation Panel constitutes a violation of the provisions of the Circular. In his brief, the complainant

points out that the Circular neither provides for the possibility of an external investigator investigating a harassment complaint nor excludes from its applicability specific staff members or staff members performing certain functions. As to the potential conflict of interest, he submits that if any of the three members appointed to consider his complaint believed that they were in a position of conflict of interest they could recuse themselves. Regarding his role as President of the Association of Professionals, the complainant notes that he only “co-propose[d]” members for the Investigation Panel. As the Director-General selected and appointed the members, his role as President was an irrelevant consideration in terms of conflict of interest. He also contends he was singled out by denying him the same right and procedure pursuant to the Circular as granted to any other staff member because he was a member of the Investigation Panel and President of the Association of Professionals.

5. In reply to the complainant’s submission on conflict of interest, the FAO submits that the voluntary recusal of Panel members would have not addressed the conflict of interest deriving from the complainant’s membership of the Investigation Panel given that he was a longstanding member of the Panel (from 2003 to 2014) and, therefore, well acquainted with all the Panel members. As such, the voluntary withdrawal of any “proposed members” would have not eliminated the perceived conflict of interest.

6. Even if some members of the Investigation Panel believed that they were not in a conflict of interest position and could perform their functions impartially, the fact that the complainant was a member of a small group of nine staff members on the Investigation Panel meant that a perception of conflict of interest could not be avoided. It is also observed that there is no evidence that the complainant was targeted because of the roles he played. His harassment complaint was referred to an external investigator because of the conflict of interest problem and for no other reason. The FAO was entitled to take this step of referring the matter to an external investigator and there was no legal error in it doing so.

7. 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.

In light of the above the complaint will be dismissed.

#### DECISION

For the above reasons,  
The complaint is 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

