

S. (Nos. 2 and 3)

v.

FAO

(Application for interpretation filed by the FAO)

130th Session

Judgment No. 4292

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for interpretation of Judgment 4065 filed by the Food and Agriculture Organization of the United Nations (FAO) on 30 July 2017*, the reply of Mr H. S. (the complainant in the proceedings leading to that judgment) dated 19 August 2019, the FAO's rejoinder of 11 October and Mr S.'s surrejoinder of 3 December 2019;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. Judgment 4065 was delivered in public on 6 February 2019. It was concerned with two complaints in which the complainant had challenged the Director-General's decision, communicated to him by memorandum dated 17 September 2014, to dismiss him with immediate effect for misconduct. The Tribunal made the following orders in the decision in Judgment 4065:

- "1. The impugned decisions of 20 April and 29 May 2017 are set aside, as is the initial decision of 17 September 2014 to dismiss the complainant.

* *Recte* 30 July 2019.

2. The matter is remitted to the FAO in accordance with consideration 8 [...].
3. The FAO shall pay the complainant moral damages in the sum of 12,000 euros.
4. It shall also pay him 1,000 euros in costs.
5. All other claims are dismissed.”

2. It is unnecessary to repeat the background facts as they are sufficiently set out in Judgment 4065. However, it is necessary to reproduce consideration 8, which is referred to in point 2 of the decision. It is, with that decision point, the object of the instant application for interpretation. The consideration relevantly states as follows:

“8. Manual paragraph 330.3.26 relevantly states that ‘[i]f a reply is received, the initiating officer [...] discusses it with the staff member and any other officer directly concerned (see para. 330.1.4). He/she then forwards it, together with comments to the Director, [Human Resources Management Division] AFH [...]’. Manual paragraph 330.3.27 relevantly provides that ‘[t]he Director, AFH [...] may discuss the matter further with the staff member and the initiating officer’. It is observed that in the email to the complainant of 12 September 2014 the Assistant Director-General ad interim [Corporate Services] informed the complainant, among other things, that the discussion pursuant to Manual paragraph 330.3.26 was not mandatory. He repeated this in his email of 25 September 2014 in response to Ms W. [...]. This was mistaken as the discussion under Manual paragraph 330.3.26 is mandatory because of the language of that provision, which is in contradistinction to the language contained in Manual paragraph 330.3.27. Moreover, it was intended to confer a right on the complainant to complete his defence orally in a discussion with the officer who initiated the disciplinary procedure.

This right was denied and this is a material flaw which requires setting aside the impugned decision in both complaints as well as the initial decision of 17 September 2014. The case will be remitted to the FAO to complete the process by complying with Manual paragraph 330.3.26 and the following paragraphs of the procedure. By this order the Tribunal does not intend to disturb any steps before and including the submission of the reply to the memorandum on 8 September 2014, which informed the complainant of the proposal to impose the disciplinary measure of dismissal on him. The order setting aside the 17 September 2014 decision is not intended to reinstate the complainant or confer an entitlement to salary or other emoluments from the date of the memorandum of 17 September 2014 (see Judgment 3731, under 9).”

3. The FAO has executed points 3 and 4 of the order. The complainant acknowledged that he received the sums awarded therein on 7 March 2019. However, the parties disagreed on the first procedural step which the FAO took in executing point 2 of the decision.

4. By letter dated 6 March 2019, the Director of the Office of Human Resources asked the complainant “to indicate if [he] would be available for a meeting via Skype or other means to complete the process as directed by the Tribunal”. In his reply dated 12 March 2019, the complainant stated, among other things, that he disagreed with the Director that the process could be completed “by carrying out now, an interview that should have taken place more than four years ago”. He raised a number of matters which, in his view, suggested that the interview “would have no meaning since no effective investigation c[ould] possibly be anymore carried out, even when the discussions during the interview reveal issues that must be probed into [...] and would thus be void of the purpose of conducting it”. He noted that Manual paragraph 330.3.26 states that the discussion is to be held with the “staff member” and observed that he was no longer a staff member. He suggested that, in any event, he might not be physically or mentally fit to participate in a discussion to defend his case or in the investigation process. He also seemed to invite the FAO to finally close the case on a mutually agreed basis.

5. In its response, the FAO stated that while it remained available to hold the meeting in accordance with Manual paragraph 330.3.26, it had no objection to agreeing not to hold such a meeting, and made what it considered to be a settlement offer “as a gesture of good faith”, which the complainant rejected. The complainant expressed regret that the FAO had not expressed its views on the issues that he had raised concerning the conduct of the interview. He further stated, among other things, that for the reasons which he gave in his letter of 12 March, the FAO’s invitation to him for the interview was not in accordance with Manual paragraph 330.3.26 as it did not meet its requirements in substance nor in form. It was against that background that, in a letter dated 12 June 2019, the FAO advised the complainant that it would file an application for interpretation of Judgment 4065 “[i]n view of the strong difference of views regarding the reading of [the judgment]” and its obligation to faithfully implement it.

6. In its application for interpretation, the FAO states that while it notes that the five points of the decision in Judgment 4065 are expressed in clear terms, it became apparent from the exchanges of correspondence between the parties (referred to in the foregoing considerations) that they have differing views regarding what the decision requires them to do. This, it states, is because “there appears to be some ambiguity as to what actions are required as a consequence of Point 1 [of the Decision], having regard to Consideration 8 of the Judgment”, on which it requests the Tribunal’s guidance.

7. The FAO is entitled to apply for the interpretation of consideration 8 of Judgment 4065 as it has done in this instance as, according to the Tribunal’s case law, as stated, for example in Judgment 3984, consideration 10, although ordinarily an application for interpretation can concern only the decision contained in a judgment, it may additionally concern the grounds if the decision refers to them explicitly so that they are indirectly incorporated in the decision. In this instance, point 2 of the decision in Judgment 4065 incorporated consideration 8 of Judgment 4065. The critical question is whether the application is receivable. As the case law further states, in the said consideration 10 of Judgment 3984, such an application is receivable only if the meaning of the judgment concerned is uncertain or ambiguous to such an extent that the judgment cannot be executed.

8. The application for interpretation is irreceivable. Consideration 8 of Judgment 4065 is clear and unambiguous. In it, the Tribunal in effect determined that the disciplinary procedure was lawful up until the time that the reply was submitted but then there was a material flaw, which warranted setting aside the impugned decision. The flaw occurred because the Administration mistakenly decided that the discussion between the initiating officer and the complainant, pursuant to Manual paragraph 330.3.26, was not mandatory.

As the Tribunal further stated, in consideration 8 of the judgment, this provision was intended to confer a right on the complainant to complete his defence orally in a discussion with the officer who initiated the disciplinary procedure. The case was remitted to the FAO for it to complete the process by conducting the discussion mandated in Manual paragraph 330.3.26 and then to continue the process in accordance with the paragraphs that follow, as relevant. It is not within

the Tribunal's purview to provide an advisory opinion or guidance concerning the steps that are to follow the discussion or what should happen if events unfold in a certain way. The Tribunal reiterates that both the FAO and the complainant must approach the implementation of its order in point 2 and the analysis contained in consideration 8 of Judgment 4065 in a rational, sensible and balanced way, and, as a paramount consideration, do so lawfully (see Judgment 3989, consideration 5).

DECISION

For the above reasons,

The application for interpretation is dismissed.

In witness of this judgment, adopted on 9 July 2020, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ