

D.
v.
FAO

132nd Session

Judgment No. 4411

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms D. D. against the Food and Agriculture Organization of the United Nations (FAO) on 27 September 2019, the FAO's reply of 15 January 2020, the complainant's rejoinder of 27 February and the FAO's surrejoinder of 15 May 2020;

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 terminate her appointment as a result of the abolition of her post.

The complainant joined the FAO in October 2016 as an Administrative Associate, grade G.6, in the FAO's Liaison Office in Geneva (LOG), under a two-year fixed-term contract. As she had previously been working for another agency of the United Nations, she was transferred to the FAO under the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances ("the Inter-Organization Agreement").

On 8 May 2017, during her lunch break, the complainant consulted a doctor who placed her on sick leave until 31 May. A few hours later, having returned to the office to clear her desk, she received an email from the Deputy Director, Office of Human Resources (OHR),

informing her that her appointment was terminated as of that day because her post was to be abolished. The Deputy Director explained that, during a recent visit to Geneva, the Director-General had had some discussions with heads of Geneva-based agencies concerning, amongst other things, “improvements to the inter-action between FAO and other organizations [...]”, and that “[t]his followed some reflections that had been carried out in Rome on the matter for a while”. In this context, a decision had been taken to abolish the post that the complainant encumbered and to “re-profile” it as a Professional position. He added that, as there was no other suitable post for the complainant in Geneva, it would not be possible to reassign her, but she would be paid compensation in lieu of notice as well as a termination indemnity.

During the weeks that followed, the complainant had several email exchanges with the Shared Services Centre (CSSD) concerning, amongst other things, the sums due to her upon separation. She also submitted her medical certificate for the period from 8 to 31 May, as well as an earlier one for 5 May, and requested that they be recorded in the electronic leave management system, to which she no longer had access.

On 25 May 2017 the FAO published a vacancy notice for the position of Administrative Officer, grade P.1, in LOG. The complainant did not apply. On 2 August she wrote to the Deputy Director, OHR, asking him to provide her with documentary evidence of the decision to abolish her post and a decision to that effect signed by Director-General, as, in her view, only the Director-General had the authority to take such a decision. Having received no reply, she filed an appeal with the Director-General on 6 August 2017, challenging the termination of her appointment. She contended that the reason given for the abolition of her post was “a sham” and that the abrupt termination of her appointment was tainted with bad faith. She also explained that she had duly submitted her medical certificates through the CSSD, as she had no access to the online system following her termination. She claimed one month’s compensation in lieu of notice; payment of 67 days of unused annual leave; a termination indemnity based on her cumulative years of service with the FAO and the agency that previously employed her, in accordance with the Inter-Organization Agreement; payment of her salary until 31 May 2017; health insurance coverage until that date; and 17 months’ salary (corresponding to the remaining period of her contract) in compensation for material and moral damages.

A few weeks later, the complainant was paid one month's compensation in lieu of notice, three months' net base salary as a termination indemnity, and an amount corresponding to 30 days' accrued annual leave.

By a letter of 5 October 2017, the Assistant Director-General, Corporate Services Department, acting on behalf of the Director-General, informed the complainant that her appeal was rejected. Referring to Staff Regulations 301.9.1 and 301.9.12, she reminded the complainant that the Director-General was entitled to terminate the appointment of a staff member holding a fixed-term appointment prior to its expiry date if the necessities of the service required abolition of the staff member's post. She refuted the assertion that the reasons for the post abolition were "a sham", and noted that the reasons had been communicated to the complainant by the Deputy Director, OHR, in his email of 8 May. The Assistant Director-General considered that the amounts paid to the complainant by way of compensation in lieu of notice and termination indemnity had been correctly calculated, and she pointed out that under paragraph 320.3.4 of the FAO Manual, the commutation of unused annual leave was limited to 30 days. The complainant's requests for certified sick leave on 5 May and for the period from 8 to 31 May were rejected on the grounds that she had not reported her sick leave in accordance with the applicable rules. Lastly, as the complainant was not a staff member after 8 May 2017, beyond that date she was entitled to health insurance coverage only as a former staff member.

On 4 December 2017 the complainant lodged an appeal with the Appeals Committee. A hearing took place on 9 October 2018 and the Committee issued its report on 18 March 2019. The Committee "noted with a degree of perplexity and concern" that, apart from the email of 8 May 2017 informing the complainant of the termination of her appointment, there appeared to be no written evidence of the "restructuring proposal for LOG" to which the Organization referred in its pleadings concerning the abolition of the complainant's post, although the Committee had specifically asked the Organization to produce such evidence. The Committee concluded that the decision to abolish the complainant's post did not comply with the Organization's legal framework and was therefore unlawful, which meant that the termination decision based on it was likewise unlawful. The Committee also found that, even if the post abolition had been lawful, the termination decision would still have been unlawful, as the FAO had made no efforts to

redeploy the complainant. It recommended that the decision to abolish her post and to terminate her appointment be quashed, and that all her claims be allowed.

A final decision on the appeal was taken by the Director-General on 18 July 2019. The Director-General agreed to postpone the effective date of the termination of the complainant's appointment until 31 May 2017, based on her sick leave certificates, which meant that she would receive her full salary for that month. He also invited her to submit evidence of any medical expenses incurred during that period. However, he maintained that the decision to abolish her post and terminate her appointment was lawfully taken and that her terminal emoluments had been correctly calculated. He therefore rejected all her other claims. This is the impugned decision.

The complainant asks the Tribunal to award her compensation in an amount equal to 16 months of her final salary, covering the remaining period of her fixed-term contract, and to order the FAO to pay contributions retroactively to the United Nations Joint Staff Pension Fund (UNJSPF) in respect of that 16-month period. As her annual leave balance stood at 67 days at the time of her separation, she claims payment of the 37 days which the FAO has refused to pay. She also claims moral damages, costs in the amount of 6,000 euros, and such other relief as the Tribunal deems just and fair.

The FAO asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. This complaint arises from the FAO's decision to terminate the complainant's appointment due to the abolition of her post. On 8 May 2017, the Deputy Director, OHR, informed the complainant by email that a decision was taken to abolish the Administrative Associate, grade G-6, post she encumbered and her appointment was terminated effective that day.

2. In summary, on 6 August 2017 the complainant filed an appeal with the Director-General challenging the termination of her appointment that was subsequently rejected by the Assistant Director-General, Corporate Services Department, acting on behalf of the Director-General, on 5 October 2017. The complainant lodged an internal appeal with the

Appeals Committee on 4 December 2017. The Appeals Committee concluded that the decision to abolish the complainant's post did not comply with the Organization's legal framework and, accordingly, it was unlawful. Thus, as the termination of the complainant's appointment was based on the abolition of her post it was also unlawful. As well, the Appeals Committee found that even if the abolition of the post had been lawful, as the FAO had made no efforts to redeploy the complainant, the termination decision would have been unlawful. The Appeals Committee recommended the setting aside of the decision to abolish her post and terminate her appointment and that all her claims be allowed.

3. In his 18 July 2019 decision, the Director-General disagreed with the Appeals Committee's findings and conclusions in relation to the lawfulness of the abolition of the complainant's post and the termination of her appointment. The Director-General concluded that the decisions to abolish the complainant's post and to terminate her appointment were lawfully taken and that her terminal emoluments were correctly calculated. Based on the sick leave certificates submitted by the complainant, the Director-General accepted the Appeals Committee's recommendation and agreed to postpone the effective date of the termination of her appointment to 31 May 2017. The Director-General rejected the complainant's other claims. This is the impugned decision.

4. The determinative issue in this complaint centres on the lawfulness of the decision to abolish the complainant's post, in particular, whether the FAO provided valid reasons for the abolition of the post to the complainant.

5. Before considering the parties' submissions, the following background facts will provide additional context for the discussion to follow. After the 8 May 2017 email notifying the complainant of the abolition of her post and the termination of her appointment, the complainant, by email of 2 August 2017 to the Deputy Director, OHR, requested that he provide her with "all documentary evidence leading to the decision to abolish [her] post". In her 6 April 2018 Counter Statement submitted to the Appeals Committee, the complainant noted that up to that date she had not received any documentation regarding the abolition of her post and asked the Committee to request the disclosure of these documents.

6. In its Reply submitted to the Appeals Committee on 16 May 2018, the FAO took the position that “[t]he restructuring was and is consistent with the FAO Conference decisions and recommendations regarding the Programme and Working Budget (PWB) for the last biennium and the present one”. The FAO claimed that “[t]he pursuit of efficiency gains and savings [was], and remain[ed], a high priority for the Organization and the restructuring of LOG and re-profiling of the [complainant’s] position took place in this context”. In relation to the restructuring of LOG, the FAO stated that it had taken place “following a visit of the Director-General at the LOG on 25 April 2017, which aimed, [among other things], at reviewing and endorsing a restructuring proposal for LOG”.

7. In view of the FAO’s claim, the Appeals Committee requested the FAO to provide documentation regarding “the restructuring of LOG, in particular documentation prepared for and documentation reflecting the results of the visit of the Director-General at the LOG on 25 April 2017, including the ‘restructuring proposal’ discussed during that visit ‘which aimed, [among other things], at reviewing and endorsing a restructuring proposal for LOG’”. As well, the Committee “requested a copy of the decision regarding the restructuring of LOG and the pre- and post-restructuring organigrams of LOG”. The FAO did not submit any of the requested documents to the Appeals Committee. Having not received any of the requested documents, the Appeals Committee found that “there seem[ed] to be no written evidence that LOG underwent a restructuring process”. The Committee also found that to its surprise the “restructuring proposal”, a copy of which it had requested, “obviously [did] not exist”.

8. As the 8 May 2017 email is the source of the present complaint, it is useful to set out the content of the email for ease of reference. In his 8 May 2017 email to the complainant, the Deputy Director, OHR, noted that the Director-General had recently been in Geneva at which time he had a number of discussions with heads of Geneva-based agencies that, among other things, focused on “improvements to the inter-action between FAO and other organizations and on the ability of the office to better support such improvements and respond more effectively to the increasing demands placed on it”. The Deputy

Director, OHR, also observed that “[t]his followed some reflections that had been carried out in Rome on the matter for a while”.

9. The Deputy Director stated that “[i]n the context of the implementation of this process, a decision was taken to abolish the post that [the complainant] currently encumber[ed] and to re-profile it as a Professional position”. The Deputy Director stated that “given the absence of any other suitable General Service position in Geneva, it [would] not be possible to reassign [her] to another post”. The Deputy Director then informed the complainant that her appointment was, therefore, “being terminated [that day] in accordance with Staff Regulation 301.9.12”. He advised the complainant that she would be paid compensation in lieu of the statutory notice period of 30 days as provided in Staff Rules 302.9.33 and 302.9.34 and she would be paid a termination indemnity as contemplated in Staff Regulation 301.15.

10. In summary, the complainant submits that other than the vague information in the 8 May 2017 email, that in her view was a sham to terminate her employment, the FAO did not provide objective grounds for the decision to abolish her post as required by the case law, as, for example, in Judgment 2933, consideration 11. Significantly, the FAO did not provide her with any documentary evidence in support of its claim of the necessity to abolish her post due to a restructuring. Accordingly, the complainant takes the position that contrary to the consistent case law that states “if a decision is taken to abolish a post, then the staff member occupying the post is entitled to know the reasons for that decision” (Judgment 3920, consideration 10), the FAO did not provide her with the reasons for the abolition of her post.

11. In response, the FAO states that the impugned decision was taken pursuant to Staff Regulations 301.9.1 and 301.9.12, which provide that the Director-General may terminate a fixed-term appointment prior to the expiration date “if the necessities of the service require [the] abolition of the post [...]”. The FAO submits that it fully discharged its obligation to inform the complainant of the reasons for the abolition of her post. In his 8 May 2017 email, the Deputy Director, OHR, explained that the Director-General had discussions with the heads of Geneva-based agencies, in particular, about “improvements to the inter-action between FAO and other organizations and the ability of the office to

better support such improvements and respond more effectively to the increasing demands placed upon it”. The Deputy Director added that it was “[i]n the context of the implementation of [that] process, a decision was taken to abolish the post [she] currently encumber[ed] and to re-profile it as a Professional position”.

12. The FAO notes that the Tribunal has consistently recognized the necessity to restructure an office as a valid justification for the abolition of a post (referring, in particular, to Judgments 2510, 3041 and 3238). It recalls that the Tribunal has also held in Judgment 4086, consideration 11, that it is within the prerogative of the management to determine the qualifications required for a particular post and to redefine duties attached to that post. The FAO points out that in Manual paragraph 116.4.1, the primary function of LOG is to enhance the Organization’s cooperation and partnerships with the UN system and with other international organizations located in Geneva. The FAO asserts that it was in this regard that it considered that improvements in inter-actions with other organizations required the re-categorization of the complainant’s post at the Professional level and, therefore, the decision was taken to abolish the complainant’s post. Thus, the FAO contends that it fully discharged its obligation to notify the complainant of the reasons for the abolition of her post.

13. Leaving aside the question as to whether the FAO complied with the relevant statutory provisions and case law, the FAO’s position concerning the abolition of the complainant’s post is factually problematic. In his email of 8 May 2017, the Deputy Director, OHR, stated that the decision to abolish the complainant’s post was taken in the context of the “implementation of this process”. In context, the word “process” can only be understood as referring to a process aimed at improving the inter-action between FAO and other organizations and the ability of the office to better support the improvements and to respond more effectively to increasing demands, that was discussed at the meeting the Director-General attended with heads of Geneva-based agencies on 25 April 2017, as stated in the immediately preceding paragraph of the email. However, in his email, the Deputy Director, OHR, did not indicate if, and when, the implementation of the process occurred or, for that matter, did not provide any information about the implementation process itself. Additionally, the date on which the decision was taken to

abolish the complainant's post was not stated in the email. Based on the content of the email, the only inference that can be drawn is that the decision to abolish the post was taken at some point after 25 April 2017.

14. This does not end the matter. The Deputy Director, OHR's, statement is at odds with the FAO's statements in its Reply before the Appeals Committee. In that Reply, the FAO stated that "the restructuring took place following a visit of the Director-General at the LOG on 25 April 2017, which aimed, *inter alia*, at reviewing and endorsing a restructuring proposal for LOG". Relevantly, the FAO stated that "the restructuring allowed the establishment of professional positions in LOG in line with the Organization's priorities set out in the [Programme and Working Budget], as explained objectively to the [complainant] in the notice of termination". In her 2 August 2017 email to the Deputy Director, OHR, the complainant requested that she be provided with the documentary evidence leading to the decision to abolish her post. The complainant did not receive a response to this request. It was only in its Reply submitted to the Appeals Committee that the FAO stated that LOG was restructured following the Director-General's 25 April 2017 visit at the LOG. Although the FAO had stated in its Reply that LOG had been restructured, the FAO, without giving any explanation, did not provide the Appeals Committee with any of the requested documentation regarding the restructuring of LOG.

15. In its pleadings before the Tribunal, the FAO again provided no information regarding the restructuring of LOG. In particular, the FAO did not adduce any evidence as to whether LOG was, in fact, restructured and, if so, when the decision to restructure LOG was taken, in particular, if the restructuring had occurred prior to the decision to abolish the complainant's post. These were facts within the knowledge of the FAO that the FAO opted not to provide. In this regard, the FAO submits that it was "not legally obliged" to provide the complainant with "documentation on the proposed restructuring", referring to Judgment 3920, consideration 11, and it emphasises that she has not "adduced any evidence to discharge her burden of proving that extraneous factors motivated the decision to abolish her post". However, as the Tribunal observed in Judgment 3415, consideration 9, "[w]hile international organisations are entitled to defend proceedings before the Tribunal, and even do so robustly, it is singularly unhelpful and inappropriate for

an organisation to refuse to provide documents sought by a complainant that are patently relevant to his case and then argue that the complainant has not furnished relevant evidence in support of that case”.

16. Despite having concluded in its reply that “[t]he impugned decision was taken in accordance with the Director-General’s prerogative to restructure the Organization”, in its surrejoinder in these proceedings the FAO submits that the complainant’s references to a restructuring proposal are “misleading”, and that “no ‘restructuring proposal’ was relied upon by the Organization in the internal appeal process”. This latter statement is disingenuous. Although the expression “restructuring proposal” may have been used only once in the Organization’s pleadings before the Appeals Committee, as indicated above, it argued in some detail that the abolition of the complainant’s post had been part of a restructuring process concerning LOG. Whilst the FAO now seeks to justify the contested decision solely by reference to “the necessities of the service”, in view of its various contradictory statements on this issue, the Tribunal can only conclude that the complainant was not provided with valid reasons for the decision to abolish her post, in breach of the requirements of the case law.

17. In these circumstances the Tribunal concludes that the abolition of the complainant’s post was unlawful and, therefore, the decision to terminate the complainant’s appointment was unlawful. Accordingly, the impugned decision will be set aside.

18. The complainant, who had reached the mandatory retirement age when she filed her complaint, does not seek reinstatement. However, she will be awarded material damages in an amount equal to the salary and allowances that she would have received, but for the unlawful termination of her appointment, for the remaining 16 months of her fixed-term contract. No deductions shall be made for health insurance contributions, as the complainant was not covered by the Organization’s health insurance scheme during that period. Equally, no deductions shall be made for the official’s contributions to the UNJSPF. These material damages shall also include an amount corresponding to the pension contributions that the Organization would have made on the complainant’s behalf had she continued to participate in the UNJSPF

for the remaining 16 months of her contract. The complainant must give credit for any income from other employment during that period.

19. The complainant also submits that the FAO failed to make any efforts to redeploy her in accordance with Manual Sections 314.2.23 and 314.2.24. It is observed that these sections only applied to “staff members with continuing and fixed-term appointments with more than 5 years of continuous uninterrupted service”. Based on the terms of the transfer agreement the complainant signed when she joined the FAO, it is clear the complainant did not meet the requirement in these sections. However, paragraph (m) of Manual Section 314, Appendix A, Redeployment Guidelines, provided that for “staff members holding fixed-term appointments who have not served for a continuous uninterrupted period of more than 5 years, efforts will be made by OHR to explore with such staff members possible options for re-assignment prior to separation”, which applied to the complainant.

20. The FAO submits that the Organization sought but was unable to identify a new assignment for the complainant in Geneva. This submission ignores its obligation in paragraph (m) of the Redeployment Guidelines. Given that the FAO informed the complainant of the termination of her appointment simultaneously with the decision to abolish her post, it is abundantly clear that the Organization did not explore re-assignment options with the complainant prior to her termination as required in the Redeployment Guidelines, for which the complainant is entitled to moral damages.

21. Lastly, the complainant submits that the FAO’s sudden termination of her appointment disregarded her dignity and harmed her professional reputation in breach of its duty of care owed to its staff members. The complainant notes that, following the termination of her appointment, she began looking diligently for employment, however, owing to the abrupt termination of her appointment coupled with her age, her applications were met with skepticism among potential employers. The complainant adds that the termination of her appointment without warning posed a financial burden, was emotionally stressful, and caused her anxiety. In this regard, other than insisting that the termination of the complainant’s appointment was lawful, the FAO did not respond to the complainant’s submissions concerning the consequences of the sudden

termination of her appointment. Nor has it offered any explanation as to why it was necessary to terminate the complainant's appointment so abruptly, which would obviously have been distressing for her, notwithstanding that it was entitled to pay her compensation in lieu of notice.

22. As stated in Judgment 3613, consideration 46, “[i]t is well established in the Tribunal’s case law that ‘international organisations are bound to refrain from any type of conduct that may harm the dignity or reputation of their staff members’ (Judgment 2861, under 91; see also Judgments 396, 1875, 2371, 2475 and 2720)”. Based on the nature of the content of the complainant’s communications with the Administration subsequent to her receipt of the email of 8 May 2017, it is clear that the unexpected notification of the abolition of her post and the termination of her appointment was a serious affront to the complainant’s dignity and caused her significant personal harm, for which she is entitled to an award of moral damages. The Tribunal assesses the total amount of moral damages at 30,000 euros.

23. Regarding the complainant’s request for the payment of the remaining 37 days of her unused annual leave, as the Appeals Committee correctly noted, it was due to the unlawful termination of her appointment that the complainant could not use those days of leave prior to the expiry of her appointment. In these circumstances, the complainant is entitled to be paid the remaining 37 days of leave.

24. The complainant is also entitled to costs in the amount of 3,000 euros.

DECISION

For the above reasons,

1. The Director-General’s 18 July 2019 decision is set aside.
2. The FAO shall pay the complainant material damages as indicated in consideration 18, above.
3. The FAO shall pay the complainant moral damages in the amount of 30,000 euros.

4. The FAO shall pay the complainant for the remaining 37 days of her unused annual leave.
5. The FAO shall pay the complainant costs in the amount of 3,000 euros.
6. All other claims are dismissed.

In witness of this judgment, adopted on 11 June 2021, 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 7 July 2021 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ