

H.
v.
FAO

133rd Session

Judgment No. 4444

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. M. H. against the Food and Agriculture Organization of the United Nations (FAO) on 2 December 2019, the FAO's reply of 18 May 2020, the complainant's rejoinder of 19 June and the FAO's surrejoinder of 20 August 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 impugns the decision to dismiss him on disciplinary grounds.

The complainant joined the World Food Programme (WFP) – an autonomous joint subsidiary programme of the United Nations and the FAO – in September 1999 at its Country Office in Bangladesh. He served under short-term assignments until August 2002, at which point he was granted a fixed-term appointment. With effect from June 2009 his appointment was converted to a continuing appointment. In January 2013 he was appointed Administration Officer, at grade NO-A, in the Bangladesh Country Office.

In November 2014 the Office of Inspections and Investigations (OIGI) opened an investigation into allegations of possible conflicts of interest involving the complainant in connection with the recruitment of a relative, Mr A., to a position with the WFP Bangladesh Country Office.

By a memorandum of 27 July 2015, OIGI notified the complainant of the allegations made against him and informed him that, if these were proven, they could lead to administrative or disciplinary measures against him. On 28 July 2015 OIGI interviewed the complainant and on 19 August 2015 it submitted its investigation report, in which it found that the complainant: (i) had failed to disclose his family relationship with Mr A. during the latter's recruitment process and thereafter; (ii) had failed to disclose that he had assisted Mr A. in his application for the position of Administrative Assistant with the WFP, although he was involved in the recruitment for that position; (iii) had revised Mr A.'s CV and added false information, which had resulted in an unfair advantage for Mr A.; and (iv) had expressed a willingness to help certain candidates in their applications for employment with the WFP as per the request of an external party known to him. OIGI concluded that the complainant had "engaged in a situation of conflict of interest, misrepresentation and [had] demonstrated lack of integrity". It recommended that the Administration take appropriate administrative and/or disciplinary action against him.

In a memorandum dated 15 February 2016, received by the complainant on 13 March 2016, the Director, Human Resources Division (HR), summarised the findings of the investigation and informed the complainant of the decision to initiate disciplinary proceedings against him based on the allegations that he: (i) had participated in Mr A.'s recruitment process and recommended the extension of the latter's contract, notwithstanding a potential conflict of interest that he had failed to disclose; (ii) had engaged in actions constituting a misuse of office by assisting Mr A. in his application and salary negotiation with the WFP; and (iii) had exposed the WFP to a risk of reputational harm both internally and externally by taking the above actions, as well as by suggesting to an external party that he might be in a position to improperly influence the recruitment process. The Director, HR, added that the disciplinary measure of dismissal with compensation in lieu of notice and without termination indemnities was the disciplinary measure under consideration. Along with the 15 February memorandum, the complainant was provided with a copy of the investigation report and was asked to respond to the charges raised therein, which he did on 22 March 2016.

By a memorandum of 3 June 2016, received by the complainant on 26 June 2016, the Director, HR, informed the complainant of the decision to impose on him the disciplinary measure of dismissal with compensation in lieu of notice and without termination indemnities. The Director, HR, explained that the Administration considered the evidence sufficient to confirm the allegations contained in the 15 February memorandum and the complainant had not provided any information that would have warranted a reconsideration of the disciplinary measure proposed therein. The complainant separated from the WFP on 27 July 2016.

On 18 October 2016 the complainant filed an appeal with the WFP Executive Director against the 3 June decision. The Executive Director rejected this appeal by letter of 20 December 2016 and, on 26 January 2017, the complainant filed an appeal with the Appeals Committee requesting the reversal of the 20 December and the 3 June 2016 decisions, reinstatement in his former position with effect from the date of separation, and payment of the salary and allowances he would have received from the latter date until the date of reinstatement. Alternatively, he requested that a less severe disciplinary measure be imposed and that he be paid termination indemnities if such measure involved dismissal. He also requested moral damages. The Appeals Committee submitted its report on 15 July 2019 recommending that the appeal be dismissed.

By letter of 4 September 2019, the Director-General of the FAO informed the complainant of his decision to accept the recommendation of the Appeals Committee. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision, to reinstate him in his former position with effect from the date of separation, and to order the FAO to pay him all the salaries and allowances he would have received had he not been dismissed with effect from the date of separation until the date of reinstatement. In the event he is not reinstated, the complainant asks the Tribunal to order the FAO to compensate him with a sum equivalent to the salaries and allowances he would have earned during a five-year period. Alternatively, if it is not possible to grant the above claims, the complainant requests that the FAO be ordered to impose upon him a less severe disciplinary measure and, should that measure involve dismissal, to pay him an adequate termination indemnity. He claims 120,000 euros in moral damages and 5,000 euros in costs.

The FAO asks the Tribunal to dismiss the complaint as irreceivable in part for failure to exhaust internal remedies and unfounded in the remainder.

CONSIDERATIONS

1. The complainant initiated the proceedings underlying this complaint on 18 October 2016, when he appealed against the decision contained in the memorandum dated 3 June 2016, which he received on 26 July 2016. In that memorandum, the Director, HR, informed the complainant of the decision to impose upon him the disciplinary measure of dismissal with compensation in lieu of notice and without termination indemnities, in accordance with the WFP Human Resources Manual (HR Manual), Section VIII.1.5.1(e). It was stated in the memorandum that the decision was based on the findings, contained in the OIGI's investigation report, that there was sufficient evidence to substantiate the allegation that, while he was involved in the recruitment and subsequent employment of a relative by both blood and marriage (Mr A.), he failed to disclose the family relationship; assisted Mr A. with his application, as well as in his salary negotiations; and also expressed to external candidates his willingness to help with their applications for employment with the WFP. By letter dated 20 December 2016, the WFP Executive Director rejected the complainant's appeal against the 3 June 2016 decision stating, among other things, that he was dismissed based on findings that he had committed serious misconduct by having "engaged in a conflict of interest" and misused his position through his involvement in matters concerning Mr A.; and that he was also found to have caused reputational harm to the WFP by informing an external party on two occasions that he would try to influence the recruitment process at their request.

2. Ultimately, in the impugned decision, the Director-General of the FAO accepted the Appeals Committee's recommendation to dismiss the complainant's internal appeal against the foregoing decision. The Appeals Committee had correctly concluded that the complainant had himself admitted the charges against him, while minimising his role on the basis that the selection panel had made a common decision; that he had played an active role in the recruitment of Mr A.; that every additional element of the case supported the conclusion that his misconduct was not an isolated incident, which was the result of his

lack of judgement or failure to recognize a conflict of interest; that it did not find any evidence that supported his claim that the decision to dismiss him for misconduct was made by an official who did not have the authority to do so; that it found no evidence that the WFP had breached its duty of care towards him; and that the decision to dismiss him for misconduct was proportionate to the charges. The impugned decision also rejected the complainant's request for the costs of his legal fees for the internal appeal.

3. In the impugned decision, the Director-General additionally recalled that the reprimand which the complainant had prior received concerned his interference with a shortlist of candidates to include in it the spouse of a government official who had sent her curriculum vitae directly to the complainant; that he had also engaged in other incidents of a similar nature, including informing an acquaintance external to the WFP that he would have attempted to influence the recruitment process in that person's favour, thereby exposing the WFP to reputational harm. The Director-General concluded that based on the applicable framework, the complainant's actions could have brought the WFP into disrepute and that the finding of misconduct fully justified the decision to impose the disciplinary measure of dismissal with compensation in lieu of notice and without termination indemnity, which was proportionate to the charges. He rejected the complainant's allegation that there were procedural irregularities in the investigative or disciplinary procedure.

4. The WFP raises receivability as a threshold issue. It states that the complainant asserted for the first time in his complaint that "the loss of his long-term employment has caused [him] considerable material damage". It accordingly argues that any claim for material damages that may be inferred from the complaint is irreceivable, pursuant to Article VII, paragraph 1, of the Tribunal's Statute, because the complainant did not exhaust the internal means of redress available to him regarding such a claim. The Tribunal however observes that, although the complainant did not request material damages in his appeal, dated 18 October 2016, to the Executive Director against the termination decision, he requested material damages in his appeal to the Appeals Committee, dated 26 January 2017. He therein sought reinstatement with retroactive effect and compensation equivalent to the salaries and allowances he would have received from the date of separation until the date of reinstatement.

Moreover, as the Appeals Committee found the complainant's internal appeal receivable *ratione materiae*, which would have included the claim for material damages, and the final decision accepted the recommendations of the Committee, the Organization is precluded from raising this plea before the Tribunal.

5. Inasmuch as the complainant challenges a disciplinary decision, it is recalled that consistent precedent has it that such decisions are within the discretionary authority of the executive head of an international organization and are subject to limited review. The Tribunal must determine whether a decision taken by virtue of a discretionary authority was taken with authority, is in regular form, whether the correct procedure has been followed and, as regards its legality under the organisation's own rules, whether the Administration's decision was based on an error of law or fact, or whether essential facts have not been taken into consideration, or again, whether conclusions which are clearly false have been drawn from the documents in the dossier, or finally, whether there has been a misuse of authority (see Judgment 3297, consideration 8).

Additionally, the Tribunal will not interfere with the findings of an investigative body in disciplinary proceedings unless there is manifest error (see, for example, Judgment 4065, consideration 5).

6. The complainant challenges the impugned decision on eight grounds. He contends that the decision to impose the disciplinary measure of dismissal was adopted *ultra vires*; the investigation process was flawed because his right to due process was not respected; the investigation and appeal processes were unreasonably long; the finding that he had a conflict of interest was wrong; the allegations of misrepresentation and misuse of office made against him are unfounded; the allegation of lack of integrity made against him is unfounded; the imposition of the disciplinary measure of dismissal was disproportionate to the alleged offence; the WFP violated its duty of care towards him.

7. The complainant submits that the decision to impose the disciplinary measure of summary dismissal was adopted *ultra vires* because there is no evidence that it was adopted by the official who was authorized to do so. He argues that the Director, HR, adopted the decision to impose the measure without authority. The plea is unfounded. It is stated in Section VIII.1.1.4(b) of the WFP HR Manual that the Executive

Director has delegated the authority to impose such a disciplinary measure on the complainant, who was a National Professional Officer at grade NO-A, to the Deputy Executive Director & Chief Operating Officer. Under HR Manual Section VIII.1.1.5(c) the Director, HR, was responsible for recommending the initiation of a disciplinary process, including charging the subject of an investigation with misconduct, as well as proposing and imposing appropriate disciplinary measures. Under Section VIII.1.1.5(d), the Director, HR, was also responsible for informing the subject of the disciplinary proceedings of charges and of the disciplinary measure imposed.

8. The complainant doubts that the Deputy Executive Director was involved in the disciplinary process. He states that he received the communication dated 2 June 2016, which is the “only supposed sign” that the Deputy Executive Director was involved, only after he (the complainant) raised the issue of lack of authority with the Appeals Committee. In his view, the WFP provided no credible explanation as to why that document did not accompany the memorandum of 15 February 2016 (which proposed the adoption of the disciplinary measure) or the memorandum dated 3 June 2016 (which imposed the measure). He states that it was inevitable for him to doubt that the document dated 2 June 2016 actually existed before he raised the issue. In the Tribunal’s view, the fact that the latter document did not accompany the memoranda of 15 February and 3 June 2016 does not mean that it was not validly issued. In any event, there is no rule or principle which required that they be communicated simultaneously.

9. The complainant claims that his right to due process was not respected in the investigative procedure. He states that he was not given the opportunity to challenge the positions advanced by other parties and witnesses; he was not provided copies of the interviews until long after the end of the investigation, when formal charges were brought against him; the investigators led him to make statements he would not have made under different circumstances. On the other hand, the FAO argues that the complainant’s right to due process was respected, as he was given the opportunity to comment on the investigation reports and any underlying evidence in the context of the disciplinary proceedings in keeping with the applicable legal framework and the requirements of the Tribunal’s case law.

10. The WFP Legal Framework for Addressing Non-compliance with United Nations Standards of Conduct (the WFP Legal Framework) contains provisions concerning the investigative procedure where misconduct is alleged. References will be made to them later, as necessary. It suffices to state, at this juncture, that they relevantly reflect the general principles in the Tribunal's case law regarding the right to due process in the investigative procedure. The Tribunal stated the following in Judgment 4038, consideration 6:

“The sole purpose of an investigation is to establish the existence of facts that may be contested during disciplinary proceedings in which the rights of defence must be scrupulously safeguarded. The Tribunal considers that it is ‘clear that the rules relating to due process, in particular, which must be respected scrupulously during the actual disciplinary proceedings [...] (see, for example, Judgment 2475), do not apply during the investigation of matters brought before an internal auditing body’ (see Judgment 2589, under 7). The Tribunal holds that, while it is preferable to notify the person concerned that she or he is to be the subject of an investigation, except where this would be liable to compromise the outcome of the investigation, such notification is not a requisite element of due process (see Judgment 3295, under 8).

Once the investigation is opened, the organisation is under an obligation to provide the person concerned with an opportunity to explain her or his conduct and to present any information on her or his behalf.”

11. Against this background, the complainant's plea that his right to due process was not respected during the investigative procedure is unfounded. His arguments suggesting that this right was violated because he did not have an opportunity to confront the persons who were interviewed and he was not provided with copies of the interviews until long after the end of the investigation, when formal charges were brought against him, are unmeritorious. Pursuant to paragraph 67 of the WFP Legal Framework, he was interviewed and sent a copy of the investigators' report and the witness statements to review. He was invited to clarify the statements made by witnesses who were interviewed. Pursuant to paragraph 77, the Director, HR, invited him to present any countervailing evidence thereby giving him the opportunity to clear up any discrepancies. The complainant availed himself of the opportunity. However, whereas during his interview he stated that at the material time he had informed his supervisor of his relation with Mr A., he did not challenge his supervisor's statement that she did not become aware of his relationship with Mr A. until the latter left the WFP. In those

circumstances, it was open to the Deputy Executive Director to find that the complainant's actions constituted misconduct based on his own admissions and on the totality of the evidence adduced in the process. The complainant has not established that the impugned decision involved a reviewable error. Additionally, the Tribunal sees nothing that precluded the Director, HR, from proffering the charges relating to misconduct against the complainant, pursuant to paragraph 81 of the WFP Legal Framework, based on the investigators' fact-finding. The complainant's argument that the investigators led him to make statements he would not have made under different circumstances is fanciful. The Tribunal discerns no violation of the provisions of Chapter II of the Legal Framework regarding the investigation of misconduct or in the determination that the complainant had committed misconduct.

12. In the foregoing premises, the complainant's request to set aside the impugned decision on the pleas which he proffers is unfounded and will be dismissed. Given the preponderance of the evidence, including the complainant's own admissions, the serious nature of his misconduct, as well as the fact that in March 2014 and prior to the commencement of the investigation in November 2014, the complainant was the subject of a written reprimand for improperly adding the spouse of a government official to a recruitment short-list, his contention that dismissal was a disproportionate measure is unfounded. Accordingly, the complainant's request to be reinstated and incidental claims will be dismissed.

13. The complainant claims compensation for material damages, which he alleges he suffered as a result of the excessive length of the internal appeal process. He submits that the length of the internal appeal procedure caused him direct financial damage, as it deprived him of the right to the free legal assistance to prepare this complaint, which was available to locally recruited staff until January 2018. But, in this case, any such notional loss in relation to the provision of legal services for these proceedings can be compensated by a costs order.

14. The complainant claims moral damages for extensive delays in the internal appeal process. The complainant was separated from the organization with effect from 27 July 2016 and contested that decision by appealing on 18 October 2016. He received the final decision on 8 September 2019. This involved a period of almost three years, which

was too long. As the complainant submits that this delay caused him “extreme suffering”, which he has articulated and which the Tribunal accepts, he is entitled to moral damages for which the Tribunal will award him 5,000 euros. As the complainant succeeds only in this claim, he will also be awarded 3,000 euros costs.

DECISION

For the above reasons,

1. The FAO shall pay the complainant 5,000 euros in moral damages.
2. The FAO shall pay the complainant 3,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 22 October 2021, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal’s Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

DRAŽEN PETROVIĆ