

N. (No. 3)

v.

FAO

133rd Session

Judgment No. 4445

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr N. N. against the Food and Agriculture Organization of the United Nations (FAO) on 6 February 2019 and corrected on 6 March, the FAO's reply of 27 June, the complainant's rejoinder of 8 September and the FAO's surrejoinder of 20 December 2019;

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 close the procedure regarding his harassment complaint against his former supervisor.

The complainant is a former staff member of the World Food Program (WFP) – an autonomous joint subsidiary programme of the United Nations and the FAO. He joined WFP in May 2010 as an Internal Auditor in the Office of Internal Audit (OSA) at grade P-4. In his 2011 and 2012 Performance and Competency Enhancement (PACE) appraisal reports his overall performance was rated as unsatisfactory by his supervisor and, ultimately, his fixed-term contract was not renewed upon its expiry on 3 June 2013. He successfully challenged his 2011 PACE report before the Tribunal, which set it aside in Judgment 3879, delivered in public on 28 June 2017. The Tribunal also ordered that it be disregarded for subsequent action. As the complainant had by then

already been separated from WFP due to unsatisfactory performance, in part based on the flawed 2011 PACE report, the FAO decided to pay him 70,000 euros. In Judgment 4229, delivered in public on 10 February 2020, on the complainant's second complaint challenging the non-renewal of his contract, the Tribunal considered that amount to be reasonable compensation for the lost opportunity to be considered for renewal as he had been separated from service without a valid reason.

It is against this background that the complainant first raised allegations of harassment against his supervisor in 2012 in the context of the PACE Recourse Procedure challenging his 2011 PACE report. The ad hoc Review Group concluded in its report of July 2012 that a formal review of complaints under the WFP Policy on Harassment, Sexual Harassment and Abuse of Authority (the "HSHAP Policy") did not fall within the mandate of the PACE Recourse Procedure. In 2013 the complainant again made allegations of harassment against his supervisor in the context of his internal appeal against the decision not to renew his contract. The Administration informed him that all issues relating to harassment should be raised in a separate harassment complaint filed under the HSHAP Policy and enquired whether he wished to submit a request for investigation pursuant to that Policy.

On 30 August 2013, approximately two months after his separation from service, the complainant submitted a formal complaint of harassment and abuse of authority against his former supervisor. He requested that an external investigator be mandated to conduct the investigation.

On 20 August 2014 the complainant was informed that his request had been approved and an external investigator had been appointed.

On 9 January 2015 the external investigator issued her report concluding that neither the documentary evidence nor the witness testimony appeared to support the complainant's allegations of harassment and abuse of authority against his supervisor.

By a memorandum of 5 February 2015, the complainant was informed that, as the investigation report did not support his allegations of harassment or inappropriate managerial actions by his supervisor, WFP had concluded that the evidence was not sufficient to support a finding of harassment and/or abuse of authority under the HSHAP Policy and that the matter was accordingly closed.

In May 2015 the complainant submitted an appeal to the WFP Executive Director against that decision. On 20 July the WFP Executive Director decided to uphold the decision to close the procedure regarding the complainant's harassment complaint as unsubstantiated. On 17 September 2015 the complainant lodged an appeal with the Appeals Committee challenging the decision of 20 July.

In its report of 22 May 2018, the FAO Appeals Committee recommended that the appeal be dismissed in its entirety. It noted that the complainant's allegations of harassment hinged considerably on his contested performance appraisal reports and that the negative appraisal reports did not amount *prima facie* to harassment by a supervisor. It also found that the complainant's claim about the alleged delay in the initiation of the formal harassment investigation was not receivable for failure to exhaust internal remedies.

By a decision dated 17 October 2018, received by the complainant in November 2018, the FAO Director-General concurred with the Appeals Committee's findings and dismissed his appeal in its entirety. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to order his reinstatement with full retroactive effect. He claims material and moral damages for the serious injuries to his dignity, self-esteem and overall personality he and his family suffered, as well as costs in the amount of 3,000 euros for the proceedings before the Tribunal and the internal appeal.

The FAO asks the Tribunal to dismiss the complaint in its entirety. It submits that the complainant's claims relating to his two PACE reports and to his separation from service are irreceivable as they were the subject of other proceedings. It considers his claim about delay in initiating the investigation of his harassment complaint irreceivable for failure to exhaust internal remedies.

CONSIDERATIONS

1. The central question to be determined is whether the Director-General erred when in the impugned decision he accepted the Appeals Committee's recommendation to dismiss the complainant's internal appeal against the closure of the procedure regarding the harassment complaint filed on 30 August 2013.

2. The complainant had initiated that complaint two months after his separation from WFP making allegations of harassment and abuse of authority against his former first-level supervisor. He alleged that that supervisor violated the HSHAP Policy through a pattern of actions which created a hostile work environment that culminated with improper comments and ratings in his PACE reports for 2011 and 2012 ultimately leading to the termination of his employment with WFP. One of his main objections to the actions concerned the supervisor's alleged statement that he was unable to write "elegant English". The complainant asserted that this was evidence of discrimination and bias against him amounting to harassment. The complainant also alleged that the supervisor subjected him to intimidating treatment ever since he appealed his 2011 PACE report.

3. The complainant further alleged that the harassment and abuse of authority could also be seen through administrative decisions, statements and his supervisor's "broader behaviour" and that while each incident may not appear to be egregious, collectively, they created a pattern of improper managerial behaviour, which the HSHAP Policy prohibits, ultimately leading to the termination of his employment. He referred particularly to alleged attempts by the supervisor to pressure him not to file a harassment complaint. He also alleged that she made an angry statement to him in the presence of OSA colleagues that he "would have been out had this been private, you are still in just because this is the [United Nations (UN)]". He further alleged that she placed a junior staff member to be the officer-in-charge despite his seniority, availability and willingness to perform the role.

4. In recommending that the procedure regarding the harassment complaint be closed, the external investigator reviewed the complaint, the complainant's supervisor's written statements and the documents which they provided, and she interviewed both the complainant and his supervisor, as well as the witnesses whom they proposed. She noted the complainant's allegations that his supervisor had overloaded him with work, unfairly blamed him for group activities, downplayed his advisory work, intentionally found fault with his work and discriminatingly renewed his United Nations *Laissez-Passer* (UNLP) for only one year instead of two years as she did for his other colleagues.

5. The investigator however concluded that the facts did not support the complainant's allegations. She found that while in 2011 the complainant conducted more audits than his colleagues, his supervisor's evidence was that the audits that were assigned to him were not as complex as some that were assigned to his colleagues. Also, the documentary evidence he provided did not show that his supervisor had unfairly blamed him for the team's performance or that she intentionally found fault with his work. Regarding the advisory services component (which amounted to 20 per cent of his work) the investigator found that the supervisor's statements to the ad hoc Review Group did not suggest that she belittled or downplayed the complainant's work but appeared to have been legitimate statements of fact or opinion provided to the Group upon their requests for explanations. The investigator further found that recommending the renewal of the complainant's UNLP for only one, instead of two years, and appointing a less senior staff member as officer-in-charge appeared "to have been actions validly taken in accordance with [WFP] procedures and/or her managerial discretion".

6. Regarding the complainant's allegation that his supervisor pressured him not to file a harassment complaint, the investigator found that a review of the complainant's assertions and his supervisor's response suggested that any discussions over his grievances were cordial and would not amount to pressure to deter him from filing the harassment complaint. The investigator additionally found that the complainant did not substantiate his allegation that the supervisor made the statement that he "would have been out had this been private, you are still in just because this is the UN". This, according to the investigator, was because the person whom the complainant said heard those words denied that the supervisor said them and stated that, to the contrary, the supervisor had always been cordial and polite to the complainant. The investigator ultimately concluded that based on her findings, an assessment of the reliability and credibility of the information gathered from the documentary evidence and the interviews, neither the documentary evidence nor witness testimony would appear to support the complainant's allegations of harassment and abuse of authority on the part of his supervisor.

7. The complainant's appeal against the decision to close the case on the basis of the investigative report, eventually to the Appeals Committee, was dismissed by the impugned decision. The complainant's

case challenging the impugned decision closely mirrors the case which he proffered in his harassment complaint.

8. The FAO raises receivability as a threshold issue. It submits that the “claims” related to the substantive and procedural aspects of the complainant’s 2011 and 2012 PACE reports, and the corresponding decision not to renew his fixed-term contract, were the subject of other complaints and that he cannot relitigate those issues in the present complaint. The Appeals Committee concluded that the complainant’s “claims” related to the subject PACE reports were irreceivable because they were the subject of two other internal appeals. The Appeals Committee expressly did not consider any aspect related to those reports which the complainant raised in his internal appeal (subsequently resolved in Judgments 3879 and 4229). This was wrong because the complainant was not seeking to relitigate the issues raised in those complaints in which he challenged the lawfulness of those PACE reports. In the present complaint his central allegation is, in effect, that specific actions by his supervisor during the course of those appraisal procedures support his allegations of harassment and abuse of authority. It is therefore clear that the complainant’s allegations insofar as they may concern those matters are intended to establish an aspect of the unlawfulness of the decision to close his harassment complaint (see, for example, Judgment 4241, consideration 7). The plea of irreceivability on this basis therefore fails.

9. The FAO further submits that the complainant did not raise the issue concerning delay in initiating the investigation of his harassment complaint in his appeal to the WFP Executive Director and may not therefore include it in his appeal to the Appeals Committee. This submission accords with the Appeals Committee’s conclusion that this aspect of the complainant’s internal appeal was irreceivable for failure to exhaust internal remedies in relation to it. The complainant however submits, in effect, that this issue was not advanced as a new claim as he only added an argument about delay in initiating the HSHAP investigation to corroborate his previous claim that the decision to close his case was unlawful. In the Tribunal’s view, the issue is more specifically a plea that supports a broader claim for moral damages, as the complainant also suggests. As it was open to him to follow that course, the plea of irreceivability regarding this issue of delay also fails.

10. On 16 September 2014, during the course of the review of his harassment complaint, the complainant requested access to his email account and calendar for the period January 2011 to June 2013. He states that despite multiple efforts, his request was denied and the harassment report was finalized without giving him an opportunity to review the calendar and his emails. He argues that this is evidence that the Organization sought to discourage him from reviewing his records in violation of the principle that a staff member must have access to all the evidence on which the authority bases its decision against him. He relied particularly upon consideration 15 of Judgment 3264, which he states the Appeals Committee ignored. It relevantly states as follows:

“15. [...] It is well established in the Tribunal’s case law that a ‘staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him’. Additionally, ‘[u]nder normal circumstances, such evidence cannot be withheld on grounds of confidentiality’ [...] It also follows that a decision cannot be based on a material document that has been withheld from the concerned staff member [...]”

11. The complainant’s request for the calendar and the emails does not fall within the principle stated in consideration 15. The complainant did not even specify what he wished to access that was related to his case. There is no evidence that any reliance was placed upon the subject emails and calendar during the harassment investigation or internal appeal procedure or that the complainant did not have access to all of the documents relied upon to arrive at the decision to close his case or to dismiss his internal appeal. Accordingly, the complainant’s claim that the Administration unlawfully denied him access to the emails and calendar is unfounded.

12. On the merits, the Tribunal has determined (in consideration 8 of this judgment) that the Appeals Committee wrongly concluded that what were, in effect, the complainant’s arguments supporting his harassment complaint based on his 2011 and 2012 PACE reports were irreceivable and would not be considered. The Committee therefore provided no analysis of the specific allegations which the complainant proffered with reference to those PACE reports.

13. Although, in the impugned decision, the Director-General endorsed the Appeals Committee's conclusion concerning irreceivability, he then "considered [the complainant's] references to [his] PACE appraisal reports to the extent that these may be considered to be pleas to support [his] allegations of harassment and abuse of authority". Recalling that the complainant bore the burden of proof, the Director-General stated that "[h]aving reviewed the evidence in this light, including the evidence and arguments presented by [the complainant], I have concluded that you have failed to substantiate your pleas". The Director-General then noted that, regarding the complainant's claims of abuse of authority and a hostile work environment, the Appeals Committee had stated that the definition of harassment in the HSHAP does not relate to grievances that arise from PACE reports challenged by a staff member. He concurred with the Committee's findings that in the absence of "strong elements pointing to the contrary", a negative appraisal "could not be likened to harassment or abuse of authority by supervisors" whilst observing that the HSHAP specified that "[d]isagreement on work performance or on other work-related issues is not normally considered harassment or abuse of authority". Referring to the Tribunal's case law that the burden to prove abuse of authority lies with the party who pleads it, the Director-General concluded that having considered the matter carefully, he found no evidence on which to conclude that the complainant's PACE assessments and the manner in which they were conducted "would serve to call into question the conclusions of the review of [his] harassment complaint".

14. The Tribunal discerns no error in the Director-General's foregoing reasoning and the conclusion in the impugned decision to the effect that the complainant had not substantiated his harassment complaint. The complainant's request for moral damages for inordinate delay in the proceedings will also be dismissed. The Tribunal accepts that the time between 30 August 2013 when the complainant filed his harassment complaint and his receipt of the impugned decision in November 2018 was too long. However, the complainant has not articulated the effect which the delay has had on him (see, for example, Judgment 4147, consideration 13).

15. In the foregoing premises, the complaint will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 21 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