

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

C. G.

v.

FAO

134th Session

Judgment No. 4500

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. J. C. G. against the Food and Agriculture Organization of the United Nations (FAO) on 8 October 2019 and corrected on 18 October 2019, the FAO's reply of 27 January 2020, the complainant's rejoinder of 10 March and the FAO's surrejoinder of 2 July 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 contests the decision to abolish the Joint Commissary Committee (JCC).

The complainant, a FAO official, was elected in February 2015 for a two-year mandate as General Secretary of the Association of Professionals in FAO ("AP-in-FAO"), one of the staff representative bodies. His mandate was renewed in 2017 for another two years.

The JCC was established to provide advice and suggestions on the policy and overall management of the Commissary located in the FAO Headquarters, and to be directly responsible for making decisions and recommendations on certain aspects of the Commissary's management.

In September 2015 the FAO convened a meeting with the staff representative bodies, AP-in-FAO and the Union of General Service Staff (UGSS), to discuss the management's proposal to expand the mandate of the Staff Management Consultative Committee (SMCC) to include several existing committees, among which the JCC. The complainant attended the meeting in his capacity as General Secretary of the AP-in-FAO. Both staff representative bodies expressed some concerns during the meeting but agreed to provide written comments on the proposed Terms of Reference of the SMCC. In that context they indicated that the merger of the JCC into the SMCC was not viable based on the recent development in the operations of the Commissary. In early November 2015 the Office of the Human Resources informed the two staff representative bodies that it would accommodate their request to maintain the JCC as a separate committee. Thus, in January 2016, the JCC was reconstituted.

On 3 May 2017 the SMCC held a meeting. The Administration informed the representatives of the staff representative bodies that there were several pending issues regarding the Commissary, and the representatives stressed that the JCC was the appropriate forum to discuss these issues. Therefore, they recommended that a meeting of the JCC be called as soon as possible. The Administration replied that since the JCC had not met for a long time, had no Chairperson and "would very likely be abolished", all issues relating to the Commissary would be discussed in the framework of the SMCC.

A few days later, on 12 May 2017, the Assistant Director-General of the Corporate Services Department informed the staff representative bodies that the JCC was abolished with immediate effect, and that from that time all issues related to the Commissary would be discussed in the framework of the SMCC.

The complainant wrote to the Director-General on 8 August 2017 in his personal capacity and as General Secretary of the AP-in-FAO. He contested the decision to abolish the JCC and the related decisions concerning the operation of the Commissary on the ground that they were taken without participation of the JCC. The proposal to abolish the JCC was clearly a question of policy and overall management of the

Commissary and should have been submitted to the JCC for its advice. The abolition of the JCC without having consulted the staff representative bodies was in breach of Article 3.5 of the Recognition Agreement between the Director-General and the AP-in-FAO (hereinafter the “Recognition Agreement”), according to which the FAO should consult the AP-in-FAO before issuing administrative provisions relating to the staff’s terms and conditions of employment or affecting the general staff welfare. The contested decisions also violated the consultation requirement foreseen by Manual Section 146, Appendix D – which concerned the JCC –, and the Director-General’s Bulletin No. 90/23 of April 1990 entitled “review of commissary operations”. The complainant also contended that the Assistant Director-General had no authority to send an email announcing the abolition of the JCC as the JCC, in its present form, was established by the Director-General on the basis of a staff-management agreement. Consequently, the same process should have been followed for its abolition. He therefore requested that the JCC be reconstituted in full accordance with Manual Section 146, Appendix D, and that all decisions concerning Commissary operations that were taken without consultation of the JCC be suspended until the JCC could be properly constituted. He also requested that the legal expenses incurred by the AP-in-FAO on this matter be reimbursed. His request was rejected in September, and in October 2017 he filed an appeal with the Appeals Committee against that rejection.

In the meantime, on 30 September 2017, the Commissary was closed.

In its report of 12 March 2019, the Appeals Committee found that the Director-General had the authority to abolish the JCC but he had failed to properly consult the JCC on its abolition. Even if one considered that the JCC did not have to be consulted, the Director-General had to consult the Staff Representative Bodies, and, in particular, the SMCC, based on Staff Rule 302.8.3, the Recognition Agreement, and the terms of reference of the SMCC. He had failed to do so. The Appeals Committee therefore recommended that the decision to abolish the JCC and to remove Manual Section 146, Appendix D, from the Manual be quashed. Consequently, the decisions falling within the terms of reference of the JCC that had been taken since its abolition should be suspended until

the JCC was given the opportunity to advise on them and make proposals to the Director-General in that respect. It also recommended that the legal expenses incurred by the AP-in-FAO on this matter be reimbursed.

By a letter of 12 July 2019, the Director-General informed the complainant that he rejected the recommendations of the Appeals Committee and the appeal because, in his view, consultation had taken place. Indeed, on the basis of discussions held in 2015, the AP-in-FAO had agreed to the merger of the JCC in the SMCC before changing its position, and the FAO had agreed not to proceed with the merger at the time. But, a year and a half later, the Administration considered that the issues that led to the postponement of the proposed merger had been substantively addressed by the JCC and the Administration stated at the SMCC meeting of 3 May 2017 that the JCC would very likely be abolished. The AP-in-FAO merely “suggested” that the JCC “would be the appropriate forum to discuss” Commissary matters without making any substantive inputs. Hence, the Director-General considered that the “consultation” that took place on 3 May formed part of the deliberations that had begun in 2015, and that the position of the staff representative bodies was well known. That is the impugned decision.

The complainant asks the Tribunal to quash the “decision of the Director-General”, as well as to order the FAO to reconstitute the JCC in accordance with Manual Section 146, Appendix D, and to suspend all decisions concerning the operation of the Commissary that were taken without consultation of the JCC. He also asks the Tribunal to refer “all proposals for future operation of the commissary and substitute facilities to the [JCC] for its advice before acting on them”. He seeks an award of costs, to be paid to the AP-in-FAO, with respect to the internal appeal proceedings and the proceedings before the Tribunal. He further claims moral damages for undue delay in delivering the final decision, which he undertakes to transfer to the AP-in-FAO.

The FAO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. In the letter to the Director-General, dated 8 August 2017, the complainant, in his capacity as the General Secretary of the AP-in-FAO and in his individual capacity, contested the initial decision contained in a communication, dated 12 May 2017, by which the Assistant Director-General of the Corporate Services Department informed him and other staff representatives that the JCC had been abolished. The Assistant Director-General, relevantly stated “I would like to inform you that the [JCC] is abolished with immediate effect. As the staff representative bodies were informed at the SMCC on 3 May, from now on, all issues related to the Commissary will be discussed at the SMCC, as the forum for discussion of issues pertaining to general welfare of staff, where management and [the staff representative bodies] could bring their representatives that are most knowledgeable about the subject. I suggest that you, through your staff representatives, bring this item to the attention of the Staff Relations Officer [...], for inclusion in the agenda of the SMCC”. The complainant also contested the related decisions notified to him in that communication concerning the operation of the Commissary. He centrally alleged that the decision to abolish the JCC was taken without its participation and without the staff representative bodies being consulted.

2. The bases of the complainant’s initial contest of the decisions contained in the 12 May 2017 communication were essentially the same that he proffered in his internal appeal to the Appeals Committee, as well as in his complaint. His case is that the JCC as constituted at the time that it was abolished was established after a year of study and negotiation involving an *ad hoc* committee which included the staff representative bodies. The process ended with a consensus on the Terms of Reference of the JCC, which were promulgated by Director-General’s Bulletin No. 90/23 in 1990 and were set out in Manual Section 146, Appendix D. As the JCC, whose role was to advise on policy, was established by a staff-management agreement, its abolition required a similar process rather than an email announcement that it had been abolished. The proposal to abolish it was a question of overall management

of the Commissary, and, as such, the proposal should have been submitted to the JCC for its advice before its abolition took effect. According to him, its abolition breached Article 3.5 of the Recognition Agreement which states that “[t]he Organization shall [...] consult the Association before issuing administrative provisions relating to the terms and conditions of employment or affecting the general staff welfare”. He states that the Tribunal had ruled in Judgment 744 that the FAO Terms of Reference of the JCC are among the terms of appointment of staff members albeit the time frame is different and the JCC Terms of Reference may be different, the same conclusion should be drawn in the present case. The abolition of the JCC was therefore a matter on which the AP-in-FAO should have been prior consulted.

3. In his complaint, the complainant requests that the impugned decision by which the Director-General rejected his appeal against the decision to abolish the JCC be set aside. He also seeks an order that the JCC be reconstituted in accordance with Manual Section 146, Appendix D. He seeks further orders that all decisions concerning the operation of the Commissary taken without consultation with the JCC be suspended and that all proposals for future operation of the Commissary and substitute facilities be referred to the JCC for its advice before acting on them. The complainant seeks an award of 10,000 euros moral damages for undue delay in delivering the impugned decision and 5,000 euros costs to be paid to the AP-in-FAO for the costs it incurred in the internal appeal proceedings and the proceedings before the Tribunal.

4. On the complainant’s internal appeal, the Appeals Committee concluded, correctly, with reference to consideration 3 of Judgment 3449, that he had a cause of action and his appeal was accordingly receivable insofar as the complainant alleged that there was a failure to consult the AP-in-FAO about the abolition of the JCC. The FAO acknowledges in the Tribunal proceedings that the Tribunal has jurisdiction to entertain the case and does not contest the receivability of this complaint.

5. It is noteworthy that the FAO's rules, in particular Staff Regulations 301.8.1 and 301.8.3, and Staff Rule 302.8.3, recognize the right of staff members, through their representative bodies, to advise the Director-General regarding personnel policies and general questions concerning staff welfare and to make proposals for the amendment of Staff Regulations and Rules. Staff Rule 302.8.2 provides that consultation and negotiation between the Director-General and recognized staff representative bodies shall be carried out in accordance with Staff Regulations 301.8.1 to 301.8.13 and the recognition agreements in force with the body or bodies concerned. Staff Rule 302.8.3 states that except in emergency situations, the Director-General shall, before issuing administrative instructions or directives on matters relating to terms and conditions of employment or affecting the welfare of the staff, consult the recognized staff representative body or bodies concerned and shall take due account of their comments.

6. The FAO proffers a number of reasons why it became necessary to abolish the JCC, essentially stating that, unlike the SMCC, it had become an inefficient forum. The FAO submits that as the administrative head of the FAO, the Director-General retained the discretion to make the final decisions and argues that in the present case the decision to abolish the JCC was a reasonable and valid exercise of the Director-General's authority under Article VIII(4) of the FAO's Constitution, Rule XXXVIII(1) of the General Rules of the FAO and Article 3.1 of the Recognition Agreement. Whilst it is true that the Director-General has authority to make final decisions, the parties agree that the AP-in-FAO had a right to be consulted prior to the abolition of the JCC. Whilst disagreeing with the complainant's assertion that the proposal to abolish the JCC should have been submitted to the JCC for its advice before it was abolished, the FAO agrees that there was an obligation to consult the AP-in-FAO. The FAO cites Article 2.3 of the Recognition Agreement which stated "[t]he [FAO] confirms the right of the [AP-in-FAO] to consult, be consulted and to negotiate with it on all aspects of the terms and conditions of employment and on any other matter which directly affects the general welfare of the membership of the [AP-in-FAO]". The critical question is whether that right was accorded.

7. The Tribunal’s case law regarding consultation states, in consideration 13 of Judgment 4230, for example, that “a proper consultation must allow a reasonable amount of time for the consulted body to discuss the issue, have its principal questions answered and provide reasoned advice or recommendations, and must also allow time for the deciding authority to take that advice into consideration prior to taking the final decision. In Judgment 380, consideration 21, the Tribunal stated: ‘Where there is only a simple obligation to consult, the decision-maker’s duty is to listen or at most to exchange views. The object of the consultation is that [she or] he will make the best decision and the assumption is that [she or] he will not succeed in doing that unless [she or] he has the benefit of the views of the person consulted. [...]’”.

8. The FAO centrally contends that “there were extensive consultations on the abolition of the JCC preceding the 3 May 2017 [SMCC] meeting, and that these consultations – held in the SMCC – met the requirement of consultation”. The FAO sets out a history of what it refers to as “[a] long consultative process [that] was initiated in September 2015 when Management presented the proposal to change the [Terms of Reference] of the SMCC in order to provide a more effective forum for consultation”. It states that the AP-in-FAO was given ample opportunity to present its position and made extensive comments on the draft revised Terms of Reference of the SMCC, including at a meeting of 13 October 2015 when it, along with another staff representative body, suggested adding an annex to the Terms of Reference of the SMCC detailing the mandate of the JCC, which included areas within the mandate of the Committees which would be discontinued.

9. The FAO refers to meetings held on 29 September, 6 October and 13 October 2015. The draft summary records of those meetings show that the participants, including representatives of the staff representative bodies, discussed the proposed revised Terms of Reference of the SMCC culminating in the expansion of its mandate, as well as in the reconstitution of the JCC in January 2016. There was no mention of discussion of the abolition of the JCC. The records show that any

mention of the possible abolition of the JCC arose subsequently at the meeting of the SMCC on 3 May 2017. The draft summary record of that meeting noted in particular that the Administration informed the UGSS and AP-in-FAO that there were several issues pending regarding the Commissary and that upon the responses of the representatives of the two bodies, the FAO's Administration stated, *inter alia*, that the JCC had not held meetings in a long time, and did not currently have a Chairperson. The record then notes the Administration's statement that, given its concerns with these matters, "the JCC would very likely be abolished and in such a case all issues related to the Commissary would be discussed at the SMCC, where Management and [staff representative bodies] could bring their representatives who were most knowledgeable about the subject". The records do not show that, prior to the notification in the communication of 12 May 2017 which informed the staff representative bodies that the JCC had been abolished with immediate effect, there were any further exchanges between the parties amounting to a consultative process pursuant to Articles 2.3 and 3.5 of the Recognition Agreement mentioned in considerations 2 and 6 above and the Tribunal's case law.

10. Whilst the Director-General undoubtedly retained the discretion to make the final decision to abolish the JCC, he was bound by Articles 2.3 and 3.5 of the Recognition Agreement, in particular, to consult, within the meaning of consideration 13 of Judgment 4230, with the staff representative bodies including the AP-in-FAO prior to taking that decision. As he did not observe the duty to so consult, the impugned decision which rejected the complainant's internal appeal will be set aside.

However, given the present circumstances, it would be impracticable, particularly having regard to the time that has elapsed, to set aside the initial decision which abolished the JCC.

Given that the complainant succeeds on this central issue, he will be awarded 1,000 euros in costs, as the Tribunal cannot award it to the AP-in-FAO to whom he requests it be paid. Indeed, the AP-in-FAO is not a party to the case.

11. The complainant also seeks orders that the JCC be reconstituted in accordance with Manual Section 146, Appendix D; that all decisions concerning the operation of the Commissary taken without consultation with the JCC be suspended and that all proposals for the future operation of the Commissary and substitute facilities be referred to the JCC for its advice before acting on them. These claims are irreceivable. The Tribunal has no competence to make such orders.

12. Moreover, the complainant's claim that the AP-in-FAO be reimbursed the legal expenses incurred in the internal appeal proceedings, which the Appeals Committee recommended but the Director-General rejected, is unfounded. The FAO's rules make no provision regarding such costs. Under the Tribunal's case law, costs of this kind may be awarded only in exceptional circumstances (see, for example, Judgment 4369, consideration 22), which circumstances are not present in this case.

13. Regarding the complainant's claim for moral damages for delay in the internal appeal proceedings, the Tribunal's consistent case law that a complainant, acting as a staff representative, is not entitled to an award of moral damages (see, for example, Judgment 4230, consideration 15) does not apply to the award of moral damages for delay. This is because an award of moral damages for delay in the internal appeal proceedings is based upon the principle that such proceedings must be conducted with due diligence and in a manner consistent with the duty of care an international organization owes to its staff members (see, for example, Judgment 4162, consideration 29). The internal appeal procedure in this case commenced on 8 August 2017 when the complainant initially contested the decision to abolish the JCC. The Appeals Committee's report to the Director-General is dated 12 March 2019. The final decision was given on 12 July 2019. The complainant bases his claim on the FAO's rules which prescribe that the Appeals Committee should normally hear an appeal within two weeks of the final submissions. He notes that the FAO filed its case statement on 8 December 2017 and he enquired about the delay in the proceedings on 15 June 2018; the Committee commenced its hearing of the case on 1 August 2018;

completed its report seven months thereafter and the Director-General's final decision was delivered four months later.

14. Whilst noting the complainant's foregoing contentions, the FAO rejects the complainant's submission that there was excessive delay in the internal appeal proceedings. It refers to Staff Rule 303.1.321, which provides that "[t]he proceedings shall normally begin within two weeks of receipt of either the last submission permitted, or the expiration of time for a submission, and shall proceed as rapidly as is consistent with a fair review of the issues being considered". While the Tribunal accepts the FAO's submission that the two-week time limit is not mandatory, the Committee's delay of almost nine months to commence the hearing of the case and a further delay of six months to complete its report was excessive given the provision of Staff Rule 303.1.321. However, as the complainant has not sufficiently articulated the effects of the delay as the case law stated, for example, in consideration 14 of Judgment 4487, further requires, the Tribunal will not award moral damages for delay.

DECISION

For the above reasons,

1. The impugned decision, dated 12 July 2019, is set aside.
2. The FAO shall pay the complainant 1,000 euros costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 26 May 2022, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ