

NINETY-FIFTH SESSION

Judgment No. 2261

The Administrative Tribunal,

Considering the complaint filed by Mr H. K. against the Food and Agriculture Organization of the United Nations (FAO) on 21 December 2001 and corrected on 4 March 2002, the FAO's reply of 31 May, the complainant's rejoinder of 19 August and the Organization's surrejoinder of 30 October 2002;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is a citizen of Syria and Canada, and was born in 1947. From 1968 he worked for the United Nations Development Programme in Syria. On 1 January 1980 he joined the FAO under an inter-agency transfer as an Administrative Assistant at grade G.6, under a continuing appointment, and was employed at the Office of the FAO Country Representative in Damascus. On 1 January 1983 he was promoted to the post of Senior Liaison/Administrative Assistant, at grade G.7. Over a period of some years the FAO Representative, who took up office in 1994, sent the complainant several memoranda drawing his attention to lapses in his performance. The complainant replied to them.

In a memorandum of 30 August 1999 the Representative reproved the complainant for changing the date of an official FAO holiday from the 22nd to the 29th August without keeping him informed and said he regarded it as an instance of misconduct. The memorandum was copied to the Office for Coordination of Normative, Operational and Decentralized Activities (OCD) at FAO headquarters. The complainant wrote back to the Representative on 1 September, copying his reply to OCD and to the Personnel Division of the Administration and Finance Department (AFP). The Representative wrote to the Director of OCD on 2 September 1999; he said he considered that the complainant's action in changing the holiday date without seeking his prior approval amounted to insubordination and recommended that disciplinary action be taken against the complainant. The Organization took the decision to send an AFP mission to Damascus to review the allegation of unsatisfactory conduct and other personnel issues that had arisen. The investigation was conducted between 8 and 14 October 1999 and a report was issued on 3 March 2000.

By a memorandum of 5 April 2000 the Director of OCD notified the complainant of the Organization's intention to impose on him the disciplinary measure of dismissal for misconduct. He said that the AFP mission's findings had revealed instances of unsatisfactory conduct summarised under three headings as "External commercial activities and misrepresentation", "Disloyalty" and "Insubordination". The Director referred to evidence that the mission had examined in connection with the complainant's outside activities. This included: an application form signed by the complainant on 10 August 1989 for the purpose of obtaining Canadian citizenship in which he had listed various private commercial activities and named three companies he had had involvement with; a statement of 11 October 1999 from the complainant saying that he had not had any dealings with those companies since approximately 1982; two letters written from the complainant, addressed to officials at the European Commission delegation in Damascus offering consultancy services; and the fact that the complainant's name appeared in the 1999 Trade Directory of Damascus as well as in the Damascus Industry Chamber's registry and that he was a member of the Damascus Chamber of Commerce. It was the comments made in certain memoranda written by the complainant to his supervisor that formed the basis of the allegations of "disloyalty" and "insubordination". Having been given five working days in which to respond to the charges, the complainant replied on 13 April 2000. By a memorandum of 25 May the Director of OCD informed the complainant that he was to be dismissed for misconduct. His service was terminated on 31 May 2000.

Seeking reinstatement, the complainant appealed to the Director-General on 8 August 2000. The Assistant Director-General in charge of the Administration and Finance Department replied on the Director-General's behalf on 5 October dismissing his appeal as unfounded. The complainant lodged an appeal with the Appeals Committee on 5 December 2000.

In its report the Committee said it was not convinced that the evidence on which the Organization had based its decision to dismiss the complainant was irrefutable. It found that the Organization had not satisfied the burden of proof and that proper administrative action had not been taken in due time. It recommended reinstating him or making a settlement that would be "economically equivalent" to such reinstatement. In a letter of 4 October 2001, which is the impugned decision, the Director-General set out the reasons why he was not in agreement with the Committee's conclusions, and rejected the complainant's appeal as unfounded.

B. The complainant submits that the decision to impose on him the disciplinary measure of dismissal for misconduct was flawed by breach of due process and an error of law, and for that reason the decision of 4 October was unlawful.

He argues that the Organization's failure to comply with due process constituted a breach of his right of defence. The AFP mission's report, which formed the basis of the disciplinary action launched against him, was not communicated to him in due time; he was misled as to its content and was given only five working days to prepare his defence. Moreover, the Organization subsequently produced only extracts of the report with no further explanation of parts that were deleted, and it contained unsubstantiated allegations made by unknown persons. He submits that because of the way it was obtained some of the documentary evidence cited therein is inadmissible and the Organization did not act in good faith. The application form used to support the charge of outside commercial activities was taken from his desk drawer by his supervisor, and the two letters addressed to officials at the European Commission delegation were never delivered, consisted of private and confidential correspondence and their use as evidence against him constituted a violation of his privacy.

There was in his opinion a further procedural flaw inasmuch as the disciplinary action was triggered by a memorandum that was not addressed to him, which ran contrary to the procedure prescribed in Manual paragraph 330.322. It was the memorandum of 2 September 1999 that constituted the formal initiation of the disciplinary action taken against him, but at the time he was not aware of its existence; yet in spite of that flaw the investigation went ahead.

In addition, the complainant argues that even though the Appeals Committee found that the evidence of any outside activities since 1997 was "weak and limited", the Director-General's decision to uphold his dismissal was still based on the evidence put forward by the Organization. In concluding that the evidence tendered by the Organization pointed to unsatisfactory conduct on his part warranting dismissal for misconduct the Director-General drew false conclusions from the facts. Dismissal, he contends, constituted a disproportionate disciplinary measure, and the impugned decision is consequently flawed by an error of law. As for the two remaining charges of disloyalty and insubordination the Director-General gave no reasons for not following the conclusions of the Appeals Committee which, again, rendered the impugned decision illegal.

The complainant claims that he suffered both financial and moral damage and that the "heavy moral pressure" imposed by the incoming Representative since 1994 was tantamount to moral harassment. He asks the Tribunal to set aside the impugned decision, and to order the Organization to reinstate him from the date of his dismissal or otherwise pay him five years' salary and allowances. He seeks compensation for moral damages and costs.

C. In its reply the Organization submits that there was clear evidence of misconduct on the part of the complainant which justified the decision to dismiss him. It does not accept his allegations that there were procedural and evidential irregularities. There was a sustained undertaking of outside commercial activities on his part and he had been given a clear warning in 1997 that he was to discontinue his commercial activities.

The FAO points out that the AFP mission report did not focus exclusively on matters linked to the complainant's conduct, and for that reason it was normal practice for the complainant to receive only relevant extracts. One of the aims of the report was to enable the Organization to determine whether it was necessary to initiate disciplinary action. As it was not up to the FAO Representative to formally initiate such action, the complainant cannot argue that there was breach of due process as a result of his not receiving a copy of the Representative's memorandum of 2 September 1999.

It asserts that it acted in good faith and there was no attempt to mislead the complainant as to the purpose of the report, and the people that gave evidence knew the complainant. It denies that any of the evidence was obtained improperly. With regard to the application form that listed the complainant's outside activities, it was found by the Representative during a search of the complainant's filing cabinet.

Turning to the matter of the other two charges held against the complainant, the Organization points out that it is clear from the impugned decision that the Director-General was rejecting the overall findings of the Appeals Committee. It refutes the complainant's suggestion that the measure imposed on him was disproportionate.

D. In his rejoinder the complainant presses his pleas. It is his view that since the regional internal auditor warned him with regard to his outside commercial activities in November 1997 any question relating to the period prior to that date cannot now be considered of relevance.

E. In its surrejoinder the Organization maintains that there was clear evidence on which the Director-General was entitled to conclude that the complainant had been guilty of misconduct. It denies that the process was tainted by errors of law and lack of due process and rejects the complainant's argument that he suffered financial and moral damage.

CONSIDERATIONS

1. By a memorandum dated 30 August 1999, copied to the Personnel Officer of OCD at FAO headquarters, the FAO Representative in Damascus accused the complainant of misconduct for having changed verbally the schedule of holiday without consulting him. On 1 September 1999 the complainant replied denying such responsibility; he copied his memorandum to the same Personnel Officer, as well as to the Director of OCD and to the Personnel Division of the Administration and Finance Department (AFP).

2. The Organization then decided that an AFP mission would be sent from 8 to 14 October 1999 to Damascus "to review the various personnel issues that had arisen in the Representation in Syria". The AFP mission report was issued on 3 March 2000.

3. On 5 April the Director of OCD forwarded to the complainant a memorandum headed "Proposed disciplinary measure dismissal for misconduct".

4. The charges formulated against the complainant were: (i) External commercial activities and misrepresentation, (ii) Disloyalty, and (iii) Insubordination.

5. On 25 May 2000 the Director of OCD informed the complainant that, after review of his comments, it had been decided to impose on him the disciplinary measure of dismissal for misconduct in accordance with Manual paragraph 330.327.

6. The complainant was dismissed with effect from 31 May 2000. His appeal to the Director-General was unsuccessful but his further appeal to the Appeals Committee resulted in a favourable recommendation.

7. On the charge of external commercial activities and misrepresentation, the Committee found that there was "inconsistency in both the appellant's and the Organization's behaviour [...] that the appellant had made different declarations with regard to the date of the cessation of outside activities, and that the Organization had decided to impose disciplinary measures on the appellant in 2000 while the proof of such outside activities had been acquired in 1997".

8. The Committee described as "weak and limited" the evidence relating to the complainant's commercial activities after the time in 1997 when the Organization had first discovered such activities and issued a warning to the complainant. It considered that disciplinary measures could and should have been taken in 1997. Consequently, a dismissal for misconduct in May 2000 was not justified since it was out of time.

9. On the charges of disloyalty and insubordination, the Committee concluded that they were not justified by the evidence and recommended that they be dismissed.

10. The Director-General refused to follow the Appeals Committee's recommendation and confirmed the complainant's dismissal. That is the impugned decision.

11. In reaching that decision the Director-General dealt in considerable detail with the Committee's findings on the first charge. He stated the following to the complainant:

"Firstly, I consider that the evidence put forth by the Organization, and the conclusions drawn therefrom, with respect to your external commercial activities and misrepresentation have not been properly dismissed by the Committee, as it has failed to provide a reasoned argument in support of its opinion. This flaw in the Committee's recommendation is particularly glaring given that this instance of misconduct constitutes the primary grounds for the impugned decision. The Organization put forth the following evidence in support of its charge:

- An application form for Canadian citizenship signed by you on 10 August 1989, in which you stated that you were acting as a representative for certain European companies and that you were an 'Administrative Officer' with the FAO as well as an 'Importer, Distributor, Merchant'. Annex 1 to this application form listed your private commercial activities. This document was provided by the [FAO Representative] to an audit mission of the Representation in 1997 and you received a warning by the Regional Auditor [...] that you should cease your external commercial activities. You recognized, in writing, that you had received such a warning.
- During the 1999 AFP mission, you certified in writing that you had not had any relation or contact with the companies cited in the above document since approximately 1982. You also declared that since being advised by the Regional Auditor in November 1997 that you could not engage in external commercial activities while being a staff member of FAO, you had ceased your medical shoes business. Finally, you stated that you did not have any continuous or recurring outside occupation since December 1997, i.e. pursuant to the warning of 1997.
- The AFP mission ascertained that in 1999 you were registered as a member of the Damascus Chamber of Commerce and that your name appeared in the 1999 Trade Directory of Damascus, as well as in the Damascus Industry Chamber's registry, where you were registered as being the owner of a shoe factory. In addition, the telephone number appearing beside your name in this registry was the same as the one found in an advertisement published in the 28 July 1999 edition of the *Al-Daleel* newspaper, which invited people interested in enrolling into a Canadian university or institute to call the number in question. Enquiries made with the Canadian Embassy in Damascus revealed that you were known to Embassy officials as the agent in Syria of the '*Canadian Education Network*'. The mission was also provided with two letters, signed by you in August 1998 addressed to two officials of the European Commission in Damascus, with letterhead reading '[K.] - Consulting - Investment - Commercial Services'. In these letters, you offered the firm's services for consultation, investment and representation in the Middle East region and mentioned that the many fields of activities of '[K.]' included environment, agriculture and the food industry."

12. The materials produced before the Tribunal amply justify the Director-General's findings of fact detailed in the foregoing extract and, indeed, the complainant does not deny their substance. Rather, the complainant argues that the decision was taken in breach of due process. The AFP mission report, which constitutes the basis of the disciplinary action launched against him, was not communicated to him in a timely manner, thus he says he was deprived of the possibility of defending himself "efficiently". He contends that there were procedural flaws and a breach of the principle of good faith. He argues that some of the evidence used against him was obtained inappropriately and is therefore not admissible. He maintains that the decision is flawed by an error of law, and the disciplinary measure taken breached the principle of proportionality.

13. There is no substance to the allegation of failure of due process. In particular, the mission report which gave the Organization information on which to base the decision to charge him, was a preliminary investigative tool and the complainant had no right to review its contents prior to the decision being made that the disciplinary procedure should be started. Once that procedure was under way, the complainant was given ample communication of the case against him and was afforded full opportunity to answer and make his defence. It was no breach of the principle of good faith for the Organization to ask the complainant for a statement of his activities and subsequently to use such statement, which was entirely exculpatory, as evidence of his deliberate attempt to mislead the investigation, which it manifestly was.

14. There was equally nothing illegal in the manner in which the Organization came into possession of any of the documents. The Canadian citizenship application document was found by the FAO Representative in an office

filing cabinet, a place where the complainant could have no legitimate expectation of privacy. Since that document was in any event in the Organization's hands before the date on which the complainant received a warning based on its contents, it is doubtfully relevant to the present charges which necessarily relate to subsequent events. The two letters written to the European Commission delegation, which by themselves demonstrate beyond contest the complainant's participation in outside commercial activities after having been specifically warned not to do so, were handed by the complainant himself to a third party who made them available to the Organization. If there was any illegality in that (and it is difficult to see what it may have been) it was not of the Organization's doing. The fact that the letters were not opened by the Organization for over a year is, by itself, simply irrelevant to the issue of their admissibility. The Director-General did not commit any error of law in disregarding the Appeals Committee's report on this matter. There was no undue delay in bringing the charges against the complainant and he did not suffer any prejudice therefrom.

15. In one respect, however, the complainant's allegation of error of law is fully justified. The Tribunal's case law holds that any decision negatively affecting an employee must be reasoned (see, for example, Judgment 2092). The Appeals Committee recommended that all three charges against the complainant should be dismissed. The Director-General disagreed and gave full and detailed reasons for doing so as regards the first charge. The Tribunal has already found that the evidence justifies this position. However, the Director-General entirely failed to give any reason whatsoever for disagreeing with the Committee's recommendations respecting the second and third charges relating to disloyalty and insubordination. It is not for the Tribunal to do as the Organization asks and itself examine the evidence to find justification for the unmotivated decision of the Director-General. Those findings cannot be sustained.

16. The complainant's submission that the punishment imposed by the Director-General was disproportionate now takes on added importance. The penalty of dismissal was upheld by him on the assumption that the appeals of all three charges were properly dismissed, but they were not. It is clear that the Director-General simply did not turn his mind to the question of whether or not the first charge alone justified the penalty of dismissal, the most serious punishment available. The Tribunal itself cannot impose a penalty but equally cannot allow a penalty to stand if it has manifestly been imposed on an erroneous assumption. Nor should it condone the Organization's failure to bring the internal appeal process to a timely and proper conclusion effectively depriving the complainant of both his remedy and his employment for over three years. Accordingly, it will quash the penalty on the first charge only and refer the matter back to the Director-General for a new decision on the penalty after giving the complainant full opportunity to make representations. Any penalty thus imposed is to take effect only from the date of the Director-General's new decision. The complainant must account for any outside earnings during the period of his reinstatement. In the circumstances, the Tribunal will not award any moral damages.

17. The complainant is entitled to costs in the amount of 2,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside and the matter referred back to the Director-General for a new decision on the appropriate penalty on the first charge only.
2. The complainant is to be reinstated with full salary and benefits from the date of his dismissal, 31 May 2000.
3. The Organization shall pay him costs in the amount of 2,000 euros.

In witness of this judgment, adopted on 9 May 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Florida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 23 July 2003.