

**107th Session**

**Judgment No. 2820**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr H. G. R. against the Food and Agriculture Organization of the United Nations (FAO) on 23 March 2007 and corrected on 20 May, the Organization's reply dated 10 August 2007, the complainant's rejoinder dated 21 June 2008, corrected on 15 September, and the FAO's surrejoinder of 30 December 2008;

Considering Articles II, paragraph 5, and VII 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 was born in 1955 and has British nationality. He began working for the World Food Programme (WFP) – an autonomous joint subsidiary programme of the United Nations and the FAO – in October 2000 as a consultant, based in Kenya, and thereafter was employed by the WFP as a consultant at various duty stations. With effect from 23 July 2005 he was appointed as Programme Officer/Head of the El Fasher Field Office (North Darfur,

Sudan) under a fixed-term contract of one year, which constituted a probationary period. In November 2005 he was assigned to the Programme Unit of the El Fasher Area Office under the direct supervision of Ms N., the Head of that Unit.

On 17 January 2006 Ms M., the Head of the El Fasher Area Office, completed a Performance And Competencies Enhancement Form (PACE), in order to evaluate the complainant's performance during the period from July to December 2005. She noted inter alia that he needed "to take on more responsibility for planning and managing his own work". On 15 July 2006 Ms N. completed the complainant's second PACE form, observing that he worked hard and conscientiously and that he was better suited to managing information and data than managing staff. On 17 July 2006 Ms M. completed the complainant's "ten-month" Probationary Performance Appraisal Report, and although the report contained some positive comments, she concluded that his performance was "marginal" and recommended that his probationary period be extended to 18 months, that is until 22 January 2007. This report was endorsed by Mr V., the Emergency Coordinator for Darfur, on 18 July 2006.

By an e-mail of 20 November Human Resources Services informed the complainant that his fixed-term appointment would not be renewed beyond 31 December 2006. On 22 November the complainant wrote to Mr V. and to the WFP Representative in Sudan requesting reinstatement. Mr V. replied on 6 December 2006 that his probationary period would end on 22 January 2007. He explained that after the complainant's probation had been extended, his performance had been monitored but he had displayed little or no progress in concrete areas that had been highlighted for improvement by his previous supervisor. The complainant wrote back the same day, stating that his first and second-level supervisors were not aware of the decision not to confirm his appointment. He asserted that Mr V. had unilaterally decided to terminate his contract and that, whereas Ms N. had been his first-level supervisor since November 2005, Ms M. had completed his appraisal report in July 2006, in

contravention of the Staff Regulations and Staff Rules. He repeated his request for reinstatement.

On 7 December 2006 the complainant wrote to the Director of the Human Resources Division and asked her to reinstate him in his post. The Director replied the same day, informing him that she had forwarded his e-mail to the Division of Legal Services.

The complainant's final appraisal report, which listed Ms N. as his first-level supervisor, was signed by Mr V. on 13 December 2006. It indicated that the complainant's performance was "marginal" and contained a recommendation for the non-confirmation of his appointment.

On 19 December 2006 the complainant wrote to the Director of the Human Resources Division again and attached a copy of his final appraisal report for her attention. He pointed out that it had not been signed by Ms N. and alleged that it had been drafted by Mr V. in violation of the Staff Regulations and Staff Rules. The Director replied on 20 December informing him that she had received the original copy of his final appraisal report and additional comments on the matter from Ms N. and Ms M. She stated that he had ten working days within which to submit his comments on the appraisal report and on the information provided by Ms N. and Ms M. Upon receipt of his comments, she would make a final determination regarding the confirmation of his appointment.

The complainant subsequently provided a lengthy critique of the process that had been followed to evaluate his work performance. However, by a memorandum dated 10 January 2007 the Director advised the complainant that she concurred with the recommendation of his supervisors not to confirm his appointment.

On 23 March 2007 the complainant filed a complaint with the Tribunal impugning the decision contained in the memorandum of 10 January. In a letter of 2 April addressed to "[t]he Legal Department" of the WFP he requested that his case be reviewed and that he be reinstated with the Programme. By a letter of 11 May the Acting Director of the Division of Legal Services enquired whether the complainant intended his letter of 2 April to be treated as a formal

appeal to the Executive Director of the Programme. He enclosed a copy of Section 331 of the WFP Human Resources Manual, which deals with internal appeals. The complainant replied on 26 May that he had already forwarded his case to the Tribunal but added that the Acting Director could send his “appeal letter” to the Executive Director “even if it looks [...] late”. By a letter dated 30 July 2007, the Acting Director of the Division of Legal Services informed the complainant that his complaint could not be simultaneously considered by the Executive Director of the WFP and the Tribunal and asked him to indicate whether he intended to pursue his complaint before the Tribunal.

On 3 August 2007 the complainant wrote to the Acting Director of the Division of Legal Services expressing the wish to withdraw suit in order to exhaust the internal appeals process. That same day he also wrote to the Registrar of the Tribunal applying for a stay of proceedings until such time as he received a final decision on his case from the Executive Director. His request was granted and on 7 May 2008, having received no final decision on his appeal – despite reminders sent to the Division of Legal Services on 11 February and 5 April 2008 – he wrote again to the Registrar requesting that the proceedings resume.

B. The complainant contends that while he was on probation he was purposely overburdened with responsibilities so that his performance would be compromised. Furthermore, in November 2005 the WFP deliberately chose not to transfer him officially to the Programme Unit of the El Fasher Area Office. He did not receive written notice of the transfer, details of his new responsibilities or a new reporting structure.

He asserts that Ms M. completed his first PACE form in January 2006 even though she had not been his first-level supervisor since November 2005. In his view, her comments were ambiguous, subjective and negative compared to her evaluation of his work for a previous period. Ms M. also completed his Probationary Performance Appraisal Report in July 2006 when it was clearly the responsibility of Ms N. He received a copy of this report which, in breach of the evaluation procedures, was signed by Ms M. and endorsed by Mr V.

He chose not to challenge this irregularity because he did not want to endanger his chances of retaining his employment.

The complainant alleges that the notice he received on 20 November 2006 regarding the non-confirmation of his appointment was provided to him prematurely before the expiry of his extended probation and prior to the evaluation and discussion of his work with his first-level supervisor that is required by the Staff Regulations and Staff Rules. He further submits that his final appraisal report was prepared by Mr V., not Ms N., and that it demonstrated bias against him and was completed in retaliation for his criticism of the evaluation process.

The complainant also alleges that Mr V. labelled him as a “weak” staff member and that he abused his power by directly and indirectly influencing the outcome of his evaluations during his probation. He submits that Mr V. unlawfully terminated his contract and that this action was motivated by racism.

Lastly, the Director of the Human Resources Division referred his case to the Division of Legal Services but then decided to evaluate it herself. In the complainant’s view, this was a deliberate action to prevent him from obtaining justice.

The complainant asks the Tribunal to quash the decision of 10 January 2007. He seeks reinstatement, moral and material damages and costs.

C. In its reply the FAO submits that the complaint is irreceivable, under Article VII, paragraph 1, of the Statute of the Tribunal, for failure to exhaust internal remedies. The complainant did not file an appeal pursuant to Staff Rule 303.1.31. Instead, he sent a letter to the Division of Legal Services and then filed his complaint directly with the Tribunal.

Referring to the case law, the FAO argues that the decision not to confirm the appointment of a probationer is discretionary and that such decisions are subject to only limited review by the Tribunal. It submits that it adhered to the Staff Regulations and Staff Rules and the relevant human resources policy governing probationary periods. It

evaluated the complainant's performance in a "legally correct manner" and, based on that evaluation, decided not to confirm his appointment. The decision does not reveal any mistake of fact or law and there was no formal or procedural flaw. No essential fact was overlooked and no clearly mistaken conclusion was drawn from the evidence. There was also no abuse of authority.

D. In his rejoinder the complainant presses his pleas. He states that he has waited for a decision from the Executive Director since August 2007 and he asks the Tribunal not to "reconsider" the receivability of his complaint. He maintains that his transfer and evaluations were procedurally flawed. He requests that the Tribunal render all the evaluations prepared during his probationary period invalid because they were not drafted or endorsed by his first and second-level supervisors.

E. In its surrejoinder the FAO maintains that the complaint is irreceivable because the complainant failed to exhaust internal remedies. As he did not receive a reply to his appeal from the Executive Director within the prescribed time limit, he should have submitted his appeal to the Chairman of the Appeals Committee. Instead, he chose to pursue his complaint before the Tribunal. It notes that his performance was appraised four times during his 18 months as a staff member but he never contested the evaluations or the authority of any of the supervisors to complete those evaluations.

## CONSIDERATIONS

1. Receivability is the determinative issue in this proceeding and only the facts relevant to this question are summarised below.

2. Between October 2000 and July 2005, the complainant worked as a consultant for the WFP at a number of duty stations in various capacities. In July 2005 he began a one-year fixed-term contract as a Programme Officer in Sudan. Following an extended probationary period of 18 months, by a memorandum of 10 January

2007, the Director of the Human Resources Division informed him that, due to deficiencies in his performance, his contract would not be renewed beyond its expiration date of 22 January 2007.

3. On 23 March 2007 the complainant filed his complaint with the Tribunal.

4. On 2 April however, in a letter to the WFP's "Legal Department", he requested a review of his case and reinstatement. In his reply of 11 May 2007, to which was attached a copy of Section 331 of the Human Resources Manual containing a description of the Programme's internal appeals procedure, the Acting Director of the Division of Legal Services asked the complainant if he wanted his letter of 2 April to be treated as a formal appeal to the Executive Director. The complainant replied on 26 May 2007 that he had already submitted his complaint to the Tribunal but that his appeal could be forwarded to the Executive Director.

5. On 30 July the Acting Director of the Division of Legal Services wrote to the complainant. Referring to the Tribunal's Statute and Section 331 of the Human Resources Manual, he explained that the WFP would object to the complaint filed with the Tribunal on the basis that it was not receivable. He also stated that the Executive Director would not consider the appeal until the Tribunal had rendered a decision in the matter or the complaint was withdrawn. He asked the complainant to advise him as to how he intended to proceed and that if no answer was received within two weeks it would be assumed that the complainant was pursuing his complaint.

6. In a letter of 3 August 2007 the complainant informed the Acting Director of the Division of Legal Services that he wanted to "exhaust first all other means available within WFP" and that he would ask the Tribunal to "suspend" his case. Indeed, that same day he wrote to the Registrar of the Tribunal, requesting a stay of proceedings until such time as he received a final decision on his case from the Executive Director.

7. The Acting Director of the Division of Legal Services advised the complainant on 20 September 2007 that his appeal remained under consideration with the Executive Director.

8. By a letter of 21 September 2007 the Registrar informed the complainant that the President of the Tribunal had stayed the proceeding *sine die*.

9. On 11 February 2008 the complainant reminded the Acting Director of the Division of Legal Services that his appeal was still outstanding. In response, on 13 February the Division of Legal Services told the complainant that his appeal remained under consideration and that the Executive Director's response would be provided no later than 14 March 2008.

10. In his reply of 5 April 2008 the complainant pointed out that several months had passed since his case had been referred to the Executive Director and stated that he would revive his complaint with the Tribunal if the Executive Director's decision was not provided to him before the end of April.

11. By a letter of 7 May 2008 the complainant informed the Registrar of the Tribunal that he had not received a decision from the Executive Director and asked the Tribunal to proceed with his complaint.

12. On the question of receivability, the complainant submits that the WFP had 11 months to consider his appeal. Despite the reminders that were sent, the Programme failed to address his grievances within a reasonable time frame.

13. The FAO argues, in its pleadings on behalf of the WFP, that the complaint is irreceivable as the complainant has failed to exhaust the internal means of redress.

14. According to Article VII, paragraph 1, of the Tribunal's Statute, a complaint is not receivable unless the impugned decision is a final decision and the complainant has exhausted the internal means of resisting it under the applicable Staff Regulations.

15. As to the internal appeal process, Staff Rule 303.1.311 provides that staff members wishing to lodge an appeal against an administrative decision should state their case in a letter to the Director-General within 90 days from the date of receipt of the decision impugned. In the case of an appeal by a staff member of the WFP, the letter is forwarded to the Executive Director of the Programme. According to Staff Rule 303.1.312, the time limit for a reply to the appeal in the case of staff members not serving at Headquarters is 60 days. If a reply is not received from the Executive Director within the time limit, pursuant to Staff Rule 303.1.313 an appeal may be submitted to the Chairman of the Appeals Committee. Staff Rule 303.1.314 requires that an appeal to the Appeals Committee in these circumstances must be lodged within 60 days from the expiration of the time limit for the Executive Director's reply.

16. Because the complainant failed to avail himself of this internal appeal mechanism when no reply was received from the Executive Director, he failed to exhaust internal remedies as required by Article VII, paragraph 1, of the Tribunal's Statute. Accordingly, the complaint is irreceivable.

17. As the FAO raised the question of the applicability of Article VII, paragraph 3, of the Statute, for the sake of completeness the Tribunal makes the following observation. Article VII, paragraph 3, provides that if the Administration fails to take a decision within sixty days of the notification of a claim, the official may have recourse to the Tribunal and the complaint is receivable in the same manner as a complaint taken against a final decision. In Judgment 2784, under 6, the Tribunal held that paragraph 3 only applies to an anticipated final decision. In the present case, it is clear

that no final decision could be anticipated until the complainant submitted his appeal to the Appeals Committee.

18. The FAO has indicated its readiness to have the complainant's appeal considered within the applicable internal appeal process. Therefore, it is not necessary to consider whether having missed the time limit to appeal provided in Staff Rule 303.1.314 the internal appeal process is still available to the complainant.

19. Although the complaint must be dismissed as irreceivable, there was an inordinate delay in providing a reply to the appeal within the time limit provided in the Staff Rules or the time in which the Executive Director was supposed to reply. Had these time limits been observed, the matter would not have proceeded beyond the original complaint. In the circumstances, the complainant is entitled to moral damages which the Tribunal sets at 1,000 euros and to an award of costs of 500 euros.

#### DECISION

For the above reasons,

1. The FAO shall pay to the complainant moral damages in the amount of 1,000 euros.
2. It shall also pay him costs in the amount of 500 euros.
3. The complaint is dismissed as irreceivable.

In witness of this judgment, adopted on 15 May 2009, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Agustín Gordillo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Mary G. Gaudron  
Agustín Gordillo  
Dolores M. Hansen  
Catherine Comtet