

119th Session

Judgment No. 3401

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr R. S. I. against the Food and Agriculture Organization of the United Nations (FAO) on 29 October 2012, the FAO's reply of 12 February 2013, the complainant's rejoinder of 15 March and the FAO's surrejoinder of 27 May 2013;

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 and the pleadings may be summed up as follows:

A. The complainant joined the FAO in 1983. As from October 2002 he held the position of Chief, Central Accounting Services (AFFC). Between April 2006 and May 2007 he was seconded to the United Nations Office for Project Services (UNOPS) in New York under an agreement between the FAO and UNOPS, after which he returned to the FAO.

On 6 April 2009 the complainant was notified in writing that his post would be abolished at the end of the 2008-2009 biennium; that is, with effect from 1 January 2010. Following attempts by the Administration to redeploy him, on 17 February 2010 he was informed of the Director-General's decision to approve his transfer to the post of Senior Advisor in the Technical Cooperation Department (TCD). The complainant took up his new duties shortly thereafter.

In the context of the FAO's attempts to redeploy him, the complainant had discussed with the Administration the possibility of a termination on agreed terms. In September 2010 he reiterated his interest in such a possibility. By a memorandum of 31 December 2010 he was informed that the Director-General did not approve the termination of his services on agreed terms. His request for a review of that decision was rejected on 28 February 2011. On 1 March 2011 he filed an appeal with the Appeals Committee in which he challenged not only the decisions of 31 December 2010 and 28 February 2011 concerning the termination on agreed terms, but also the transfer decision of 17 February 2010. On 7 February 2011 he tendered his resignation, which was accepted by the Director-General, and he separated from service with effect from 31 March 2011.

Meanwhile, on 10 January 2011 the complainant filed a formal complaint of harassment in which he alluded, inter alia, to the circumstances surrounding his transfer. On 28 November 2011 he was informed that, following an investigation by the Investigation Panel, his harassment complaint had been closed for lack of evidence. His appeal lodged with the Director-General challenging this decision was rejected on 19 March 2012 and he was informed that he could further appeal the Director-General's decision to the Appeals Committee if he so wished. The complainant did not lodge such an appeal.

The Appeals Committee issued its report on the complainant's appeal of 1 March 2011 in June 2012, recommending that his claims be dismissed. However, the Committee considered that the way in which the complainant's situation had been managed reflected poor management by the FAO, and it therefore recommended that an investigation be undertaken by an independent body. By a letter of 22 August 2012 the Director-General informed the complainant that, in line with the recommendations of the Appeals Committee, his complaint was rejected as unfounded. The recommendation that an investigation be held was also rejected, especially in light of the Investigation Panel's findings on his allegations of harassment. That is the impugned decision.

B. The complainant submits that, following his return from secondment in May 2007, he was the subject of harassment, the aim of which was to undermine and impair his future career development and job prospects and ultimately to force him to leave the FAO. He alleges in particular that he was marginalised and left for long periods without any work assignments, or given tasks not commensurate with his grade and experience, that information about available positions was withheld from him and that there was no proper consultation regarding his redeployment. In addition, he contends that the FAO disregarded its Staff Rules and Administrative Manual and failed in its duty of care. He was not consulted when his post was abolished, but was redeployed without his agreement to a position that did not match his skills or experience, in which he had no real duties or responsibilities. Indeed, the post in question was not filled after his resignation. His requests to be redeployed to other suitable positions, even at a lower grade, were simply ignored.

The complainant asks the Tribunal to order the FAO to accept a proposal for the termination of his services “on agreed terms of 18 months”. He seeks compensation in an amount equivalent to what he would have received had he been given three months’ notice. He asks the FAO to conduct an independent investigation in line with the recommendation made by the Appeals Committee. He also claims moral damages and costs.

C. In its reply the FAO submits that no final decision was taken by the Director-General with respect to the complainant’s allegations of harassment and thus, his related claims before the Tribunal are irreceivable for failure to exhaust the internal means of redress. As his claims regarding the FAO’s alleged breach of duty of care were raised in the context of his harassment complaint, these claims are likewise irreceivable. In addition, his claims regarding the decision to transfer him to the position of Senior Adviser, TCD are irreceivable because he failed to exhaust the internal means of redress in a timely manner. Indeed, the matter was time-barred when he first raised it with the Director-General, albeit obliquely, in January 2011. Moreover, the complaint is irreceivable *ratione materiae*, as there has been no violation,

in substance or in form, of the complainant's terms of appointment or of the FAO's Staff Regulations and Staff Rules. The Director-General's decision not to authorise the Administration to make an offer to the complainant of termination on agreed terms does not give rise to rights which could be considered to have been "violated". Nor can the complainant derive any right to a termination on agreed terms from his status as an FAO staff member or as an international civil servant.

On the merits, the FAO contends that the final decision to transfer the complainant was taken after his views were sought with respect to three transfer proposals to senior-level positions which took into account his interest and work experience as a senior manager. The FAO had regard to his dignity and good name and did not cause him any unnecessary hardship. The relevant statutory provisions were correctly applied. In addition, the FAO adhered to the requirements of due process set out in the Tribunal's case law. There was no breach of the FAO's duty of care with respect to the complainant and it took all reasonable steps to effectively redeploy him.

The FAO emphasises that the core issue of the present complaint relates to the fact that the complainant did not receive an offer to terminate his employment on agreed terms. It states that agreed terminations, occur in accordance with Staff Regulations 301.9.11 and 301.15.2, and they have never been used to facilitate the separation of staff members who want to leave the FAO. In the complainant's case, the conditions for termination on agreed terms were not satisfied. The FAO asserts that the complainant's decision to resign was made of his own free will.

Lastly, the FAO submits that, contrary to the recommendation of the Appeals Committee, no further investigation into the way it handled the complainant's situation was warranted. It asserts that the Committee's recommendation does not fall within the Committee's mandate as set out in Staff Rule 303.1.14.

- D. In his rejoinder the complainant presses his pleas.
- E. In its surrejoinder the FAO maintains its position in full.

CONSIDERATIONS

1. The complainant was notified, in a letter dated 31 December 2010, of the Director-General's decision not to approve the termination of his appointment on agreed terms. The complainant appealed that decision in a letter to the Director-General dated 12 January 2011. His appeal was rejected on the basis that it did not comply with the requirements of Staff Rule 303.1.311, since it was not directed against an administrative decision and since no particular right or term of employment had been violated. The complainant filed an appeal with the Appeals Committee on 1 March 2011 against: the 17 February 2010 decision to transfer him to the post of Senior Advisor, TCD the lack of an offer of agreed termination; and the 28 February 2011 decision rejecting his appeal to the Director-General of 12 January 2011.

2. In its report dated 15 June 2012, the Appeals Committee found that the complainant's claim against his transfer to the post of Senior Advisor was time-barred as it had been raised more than nine months after the date on which the transfer decision was communicated to him. Regarding his second claim, the Appeals Committee stated that it "considered that the necessary conditions for an agreed termination to have been envisaged were not present and that the Director-General's refusal to offer an agreed termination to the [complainant] had not violated any of [his] rights nor had any rule or procedure been breached". It noted that "the Director-General has complete discretionary authority to offer to separate staff members on agreed terms" and referred to Staff Regulation 301.9.11, which provides that "[t]he Director-General may also, in exceptional circumstances, terminate the appointment of a staff member who holds a continuing or a fixed-term appointment if such action would be in the interest of the good administration of the Organization and in accordance with the standards of the FAO Constitution, provided that the action is not contested by the staff member concerned". The Appeals Committee noted the FAO's submission that in the past decade agreed terminations had been used "to compensate a staff member whose post has been abolished, who has expressed an interest in early retirement and with whom an

agreement can be reached that is in line with the Organization's policy and practice in agreed terminations", and that therefore "the refusal of the Director-General was thus not an 'administrative decision' as defined in Staff Rule 303.1.311". The Appeals Committee recommended that the complainant's request to set aside the Director-General's decision not to approve the termination of his appointment on agreed terms be dismissed, along with his challenge to his transfer, and his claims for moral damages and costs. The Appeals Committee further recommended that "an investigation be undertaken by an independent body deemed appropriate by the Organization, and the findings of this investigation be brought to the attention of the Director-General for action deemed appropriate and in order to prevent the recurrence of similar situations in future".

3. In a letter dated 22 August 2012, the Director-General informed the complainant of his decision to follow the recommendation of the Appeals Committee to dismiss the complainant's appeal and associated claims as unfounded. With regard to the Appeals Committee's further recommendation, he stated: "there was an investigation into your complaint of harassment, which concerned the same facts as those advanced in support of the claims you made in [t]his appeal. The outcome of that investigation was that there was not sufficient evidence to support a *prima facie* finding of harassment." He noted that if the complainant wished to pursue his appeal further, in accordance with Manual Section 332, he was entitled to lodge a complaint with the Tribunal within 90 days of receipt of the decision.

4. The complainant filed a complaint on 29 October 2012 against the Director-General's decision of 22 August 2012. His claims for relief are set out under B, above. He bases his complaint on the following grounds: "continual and targeted harassment that [he has] been subjected to since [his] return from secondment in May 2007 aimed at undermining [his] position and impairing [his] future career development and job prospects so as to force [him] to leave the Organisation through no fault of [his] own"; and that the FAO disregarded the Staff Rules and Administrative Manual and did not fulfil its duty of care towards staff.

5. The Tribunal finds that the complainant's claim of harassment is irreceivable for failure to exhaust all internal means of redress in accordance with Article VII, paragraph 1, of the Statute of the Tribunal. The complainant was informed of the Investigation Panel's finding that it could not discern a *prima facie* case of harassment as set out in Administrative Circular 2007/05. The Deputy Director-General (Operations) accepted the Panel's finding and closed the harassment case. The complainant appealed that decision in a letter to the Director-General dated 19 January 2012, but he did not file an internal appeal with the Appeals Committee when his appeal was rejected as being without merit. The complainant cannot now raise this issue before the Tribunal.

6. The complainant's claim regarding the Director-General's decision to follow the Appeals Committee's recommendation to dismiss his claim against his transfer is unfounded. The Tribunal finds that the FAO, having offered the complainant three possibilities for redeployment and having transferred him, observed its duty of care towards him. As the Appeals Committee noted, the complainant did not contest his transfer within the time limits provided by the Staff Rules and he could not raise the issue in the internal appeal as the matter was time-barred. The complainant's claim of a breach of the duty of care is related to his transfer. Thus, that claim must also be considered as time-barred.

7. The Tribunal finds that the complainant's claim with respect to a proposal for the termination of his appointment on agreed terms is unfounded. The FAO was under no obligation to offer the complainant an agreed termination when he tendered his resignation. Staff Regulation 301.9.1 provides that "[t]he Director-General may terminate the appointment of a staff member who holds a continuing appointment (i) if the necessities of the service require abolition of the post or reduction of staff, or (ii) whose services prove unsatisfactory, or (iii) who is, for reasons of health, incapacitated for further service". Staff Regulation 301.9.11, quoted in consideration 2, above, provides for the termination of the appointment of a staff member who holds a

continuing or fixed-term appointment if such action would be in the interest of the good administration of the FAO. Staff Regulation 301.15.2 provides that “[p]ayment of a termination indemnity to a staff member terminated under Staff Regulation 301.9.11 of an amount not more than 50 per cent higher than that which would otherwise be payable under the existing Staff Regulations may be authorized where the circumstances warrant and the Director-General considers it justified”. Following the abolition of the complainant’s post, the FAO identified a senior-level position commensurate with his professional qualifications and skills. As noted above, the complainant did not formally contest his transfer, the job description, or the actual duties assigned to him. Having been assigned to a regular post, he did not fit any of the criteria which could have qualified him for a potential termination on agreed terms. Moreover, there is no element which shows that the Director-General exercised his discretion improperly.

8. With regard to the Appeals Committee’s further recommendation regarding the way the FAO managed the complainant’s situation, quoted under consideration 2 above, the Tribunal notes that the Director-General considered this recommendation when taking his final decision. The Director-General indicated that the relevant facts had already been investigated by the Investigation Panel and consequently, he decided that a second investigation was unnecessary. The Tribunal considers that as the complainant did not contest the results of the Investigation Panel’s conclusions in an internal appeal, the Director-General did not err in rejecting the recommendation of the Appeals Committee in this respect.

9. In light of the above considerations, the Tribunal finds the complaint to be irreceivable in part and, for the remainder, unfounded on the merits. The complaint will be dismissed and the complainant shall bear his costs.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ