

**119th Session**

**Judgment No. 3402**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr V. N. against the Food and Agriculture Organization (FAO) on 15 March 2012 and corrected on 20 June and 11 July, the FAO's reply of 29 October 2012, the complainant's rejoinder of 1 February 2013 and the FAO's surrejoinder of 12 April 2013;

Considering Article II, paragraph 5, 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 1999 under a fixed-term appointment as a Statistician in the Statistics Division, Department of Economics and Social Development, at the Organization's Headquarters in Rome, Italy. In October 2005 he was granted a continuous appointment. In September 2007 he was transferred to the post of statistician in the FAO's Regional Office for Africa (RAF).

In 2005 and 2006 the Office of the Inspector General (AUD) conducted an audit review of lump sum payments made to staff for entitlement travel. In that context, it carried out an investigation into

what appeared to be overlapping duty and entitlement travel by the complainant. It issued its report in April 2006 concluding that the complainant had not used the lump sum paid to him for home leave travel in 2003 for that purpose, but had instead taken advantage of duty travel to finance his home leave travel. In particular, he had arranged for the return journey on duty travel from Rome to South Africa to be routed through Burundi, his home country, so that he could take his home leave on his way back from duty travel, thus using the duty travel ticket to finance most of his home leave travel. In so doing, he had falsely certified official travel documents to obtain undue financial benefits, an action which was contrary to the FAO's rules and which constituted unsatisfactory conduct. AUD recommended appropriate disciplinary action and recovery of the lump sum in question.

Under cover of a memorandum of 18 June 2008, the Director of the Human Resources Department forwarded to the complainant a memorandum from the Assistant Director General/Regional Representative, RAF, dated 13 June 2008, notifying him of the findings of the AUD investigation and the charges raised against him. These consisted in unsatisfactory conduct, fraud, violation of the Standards of Conduct for the International Civil Service and violation of the obligation to cooperate in the AUD investigation. He was informed that it was proposed to impose upon him the disciplinary sanction of dismissal pursuant to the FAO Manual paragraph 330.2.41 and to recover a sum of approximately 3,500 United States dollars, representing the portion of the lump sum that he had received in 2003 for his own home leave travel, less the amount that he had himself paid for having the return journey of his duty travel itinerary re-routed through Burundi. He was asked to respond to the charges, which he did in a memorandum dated 14 July 2008. He explained that he had no intention to defraud the Organization and that his case was a clear case of his simply not knowing the rules and not being properly guided by those responsible for providing guidance. On 22 July 2008 the Assistant Director-General/Regional Representative met with the complainant to discuss his response.

By a memorandum of 6 April 2009, the complainant was informed of the decision to dismiss him for unsatisfactory conduct in accordance with Manual paragraphs 330.1.51, 330.1.52(a) and (c) and 330.2.41(b). He was also informed that the sum of 3,559 dollars, representing the portion of the lump sum paid for his own home leave travel in 2003, namely 3,788 dollars, less the amount of 192 euros paid by him for the re-routed duty travel ticket, would be deducted from his terminal emoluments. The complainant separated from the FAO on 12 May 2009. On 16 July 2009 he appealed to the Director-General against the decision to dismiss him. Following the rejection of this appeal, on 13 November 2009 he lodged an appeal with the Joint Appeals Committee (JAC). In its report of April 2011, the JAC concluded by a majority that the charges had been established and it recommended that the appeal be rejected. Two members of the JAC appended dissenting opinions, recommending that the appeal be upheld and that the complainant be reinstated in his position. By a letter of 16 December 2011 the Director-General informed the complainant that he had decided to reject his appeal. That is the impugned decision.

B. The complainant categorically denies having committed fraud and he submits that his unsatisfactory conduct consisted in “a mere paperwork violation”. He points out that the Administration has put forward no evidence demonstrating intent on his part to defraud the Organization. He never attempted to conceal any of his actions, given that the Administration was at all times aware that he was combining the lump sum option for home leave with duty travel. The charge of fraud rested on the allegation that he had falsely certified a Travel Expense Claim, which was no more than an honest mistake on his part due to his lack of familiarity with the pertinent rules. The Administration could easily have discovered and corrected this mistake, including by recovering from his salary the lump sum paid for home leave pursuant to Staff Rule 302.3.17. In his view, the Administration was negligent in advising him as to the correct procedure and the appropriate form to be filled.

The complainant alleges a breach of due process. Indeed, he was denied the right to be heard and to put forward a proper defence. Notwithstanding the fact that several officials, including his supervisor, had knowledge of his home leave and duty travel arrangements and could therefore have provided useful information, he was the only person to be interviewed by AUD during the investigation. The so-called “Notes of Interviews”, in which AUD summarised his interviews and on which the Administration almost entirely based the charge of fraud against him, were drafted and finalised without him being given the opportunity to comment on them, a fact which alone vitiates the dismissal decision. He was not afforded a proper adversarial procedure because the JAC, which was the only forum where he could be afforded an adversarial process given that the FAO does not have a joint disciplinary board, denied him the opportunity to appear in person and did not examine any witnesses, relying solely on the AUD’s “Notes of Interviews”. Contrary to the requirement that charges be precisely worded and based on rules in force at the time of the alleged misconduct, the Administration relied inter alia on Administrative Circular 2004/19, which was issued after the events to which the charges relate. Lastly, there was a significant delay in processing the charges of misconduct which, in his view, warrants compensation.

The complainant asserts that the disciplinary measure imposed upon him was wholly out of proportion to the alleged offense and that it was also in breach of the principle of equal treatment, given that much less severe disciplinary measures were imposed on other staff members who had committed similar violations. He contends that the FAO failed to respect his right to a speedy resolution of his appeal, since it took some two years to complete the internal appeal proceedings.

He asks the Tribunal to set aside the impugned decision and to order his retroactive reinstatement and the removal of any adverse material from his personnel file. He seeks material damages equivalent to what he would have earned if his appointment had not been terminated, including salaries, allowances, emoluments and other

entitlements, together with interest, from 30 April 2009 through the date of his reinstatement. In the event that the Tribunal does not order reinstatement with retroactive pay, he also seeks material damages for the loss of his earning capacity and his diminished job prospects. He claims moral damages in the amount of 50,000 euros and he also claims exemplary damages and costs.

C. In its reply the FAO submits that there were valid grounds for the decision to impose upon the complainant the disciplinary measure of dismissal. Indeed, he planned his home leave to coincide with his duty travel in order to obtain a financial benefit. He did not provide complete information regarding his travel arrangements and he even made false statements in his travel documentation. The Administration had no knowledge of his actions, which were in breach of the rules and designed to bring a financial advantage to him to the detriment of the Organization. His explanations to AUD were contradictory and only after the completion of the AUD investigation did the FAO have a full picture of what had occurred. The dismissal decision was based on a careful review of all evidence which left no reasonable doubts as to his fraudulent actions.

According to the Organization, the complainant's due process rights were respected at all times. The investigation was fair and the evidence supporting the dismissal decision met the required standard of proof. The complainant was given ample opportunity to put forward evidence in support of his case and to review all the evidence upon which the Administration's decision was based. AUD interviewed him on several occasions and the information it obtained was sufficient in order for it to make its findings. In any event, the complainant did not request that other persons be interviewed. Although AUD's "Notes of Interviews" were forwarded to the complainant together with the memorandum of 18 June 2008, he raised no objection to them in his response to said memorandum. The FAO considers that the complainant failed to provide a reasonable explanation for both his actions and his contradictory statements. As a result, his explanations were rejected by both AUD and the JAC. Noting that Administrative Circular 2004/19 did not form the basis of the charges leveled against

the complainant, it asserts that the dismissal decision was taken pursuant to the applicable rules.

The Organization submits that the disciplinary measure of dismissal was appropriate and proportionate. As to the alleged delay in the internal appeal procedure, it contends that it did not cause the complainant any prejudice. It explains that reinstatement would not be appropriate, as there are no grounds to support it and the element of trust, which is necessary in an employment relationship, has been destroyed.

D. In his rejoinder the complainant explains that in January 2010, i.e. within seven months after his dismissal, he was re-engaged by the FAO as a consultant. This, in his view, is inconsistent with the Administration's conclusion that he committed fraud, and it clearly demonstrates not only that the disciplinary measure of dismissal was disproportionate but also that he can easily be reinstated. He contends that the FAO's proof of his alleged intent to defraud rests almost entirely on the "Notes of Interviews", a highly prejudicial document which is not an accurate transcript of the interviews and which, contrary to the FAO's assertion, he had no opportunity to review. He denies having made contradictory statements, explaining that he testified to the best of his recollection almost three years after the relevant events. He rejects the allegation that he did not fully cooperate with AUD.

E. In its surrejoinder the FAO maintains its position in full. It contends that the complainant's re-engagement as a consultant after his dismissal was the result of a misrepresentation on his part and it does not therefore support the conclusion that he can easily be reinstated. Indeed, in the personal history form that the complainant submitted in connection with his application for a consultancy contract, he recorded the "End of contract" as the reason for leaving the service of the Organization.

## CONSIDERATIONS

1. On 16 December 2011, the Director General of the FAO dismissed an appeal against a decision to dismiss the complainant for fraud. The decision of 16 December 2011 is the impugned decision. The Director General's decision was based on a recommendation of a majority (three members) of a Joint Appeals Committee (JAC) who were satisfied that the charges of fraud had been established. A minority (two members) were not satisfied that the charges had been established.

2. The central issue is a simple but important one. It is whether the evidence in support of the charges established the requisite intention to defraud on the part of the complainant.

3. In outline, these are the facts. The complainant was based in Rome for his work with the FAO. His place of permanent residence was Bujumbura, the capital of Burundi. He was entitled to home leave every two years. In 2003 the complainant, in exercise of that entitlement, made arrangements for his family (himself, his wife and two children) to travel to Bujumbura in August and September 2003. Most of the documents relied upon by the FAO in these proceedings are annexures to the report of the Office of the Inspector General (AUD) of April 2006 ("the auditor's report"). In furtherance of his entitlement to home leave, the complainant lodged with the administration on 5 May 2003 a request for a Travel Authorisation indicating that he wished to avail himself of the option of an 80 per cent lump sum payment in respect of the travel expenses for himself, his wife and his two children. On 16 May 2003 this request was approved and a Travel Authorisation ("the family TA") was issued, in which the travel was identified as Rome, Bujumbura, Rome. The family TA is a typed document and not signed by the complainant. It is not entirely clear from the material before the Tribunal, how and by whom this document was generated or created. In the auditor's report it is said that the document was approved by the Travel Unit on 15 July 2003. In his brief the complainant says that he "initiated the

Travel and Payment Authorisation process, resulting in approval from his Division by 18 May 2003”. At the very least, this document was created by a person in the Administration based on information provided by the complainant.

4. In May 2003 (precisely when is unclear on the material before the Tribunal) the complainant booked travel with the FAO travel agent for the family travel. That is to say, he booked airfares for himself, his wife and two children to travel from Rome to Bujumbura and return. While it is not clear from the material before the Tribunal when the tickets were actually issued for this travel, it can be inferred that tickets were issued before the travel because, on the complainant’s account, he used his ticket issued for this travel to travel to Bujumbura later in 2003. Though, it should be noted, the complainant gave conflicting accounts in his interviews with the AUD auditors concerning whether his ticket was issued at that time or later. On 13 May 2003 the complainant completed a leave application form indicating he would take leave from 20 August to 9 September 2003 inclusive and would be travelling to Bujumbura. At the time the complainant booked the family travel, he also booked to travel to a conference in Durban, South Africa, to be held between 18 and 22 August 2003. It is common ground that this travel, as booked, involved flying from Rome to Durban then to Bujumbura and thereafter returning to Rome.

5. The complainant was aware of the possibility that he would attend this conference as early as 30 May 2002. E-mail correspondence at that time indicated that the person invited and possible attendee (Mr G.) would not be able to attend but that he would like the complainant to attend. Mr G. was the supervisor of the complainant. The complainant was sent this e-mail correspondence. A Travel Authorisation (“the conference TA”) was issued for his travel to attend the conference. There is correspondence which shows that that the complainant paid 192 euros towards the cost of the travel for the additional cost of returning to Rome via Bujumbura rather than returning directly from Durban. It is not in issue that in fact he did make this payment.

6. After the complainant returned to Rome he submitted two Travel Expense Claim forms (TECs) and both were submitted on 11 September 2003. One was for the family travel on home leave (“the family TEC”) and recorded that the sum of 11,270.86 United States dollars had been paid on 16 July 2003. This amount was almost certainly written by the complainant in a section of the form in which the person completing it must identify “ADVANCES RECEIVED”. That is to say the complainant was acknowledging that he had already been paid 11,270.86 dollars and recording that it had been paid on 16 July 2003, before the family travel was undertaken. The second TEC was for his duty travel to the conference (“the conference TEC”) in the sum of 970 dollars. These documents are central to FAO’s allegation of fraud. Each TEC sought the reimbursement of travel costs or was acquitting travel costs already paid by way of advance. Each TEC provided for a signature of the traveller immediately after text in the following terms:

“I certify that the amount claimed is correct and that payment thereof has not been nor will be made by any other source.”

On each form, the complainant signed below this text. Thus, on the face of it, the complainant was certifying that the claimed amount in relation to family travel was not the subject of payment from any other source and that the claimed amount for the conference travel was not the subject of payment from any other source. The statement in relation to the family travel was not true because the complainant’s travel to Bujumbura and his return travel to Rome was being paid by the FAO (apart from the 192 euros mentioned earlier) as an incidence of his attendance at the conference in Durban. Without explanation, this is at least *prima facie* evidence of fraud.

7. In his brief, the complainant’s explanation for this apparent anomaly was that he submitted the family TEC on the basis that it concerned only the travel of his wife and two children. However the amount of 11,270.86 dollars was the amount paid to him in consequence of the lodgement of the family TA that concerned travel for himself as well as his wife and two children. Thus it is highly improbable that the complainant did not know that in signing the certificate on the family

TEC, the certification related to his travel as well as that of his family. The Tribunal draws the inference that he did. Accordingly, the complainant lodged two TECs on 11 September 2003 that deliberately misstated the facts, and thereby failed to disclose the fact, that the cost of his travel to Bujumbura was effectively being paid twice by the FAO (apart from the 192 euros he paid). The obvious inference is that he was deliberately doing so to gain a financial benefit. This is fraud.

8. The inference that the complainant was engaged in fraud is fortified by the evidence that the complainant planned his travel with his family to coincide with his travel to the conference. Both involved travel to Africa. In its reply, the FAO identified several facts that support the drawing of that inference. They include a statement in the complainant's brief that "[i]n anticipation of the approval of the duty travel, in May 2003 [c]omplainant tentatively booked his duty travel and home leave flights with the [FAO]'s travel agent". The complainant seeks to answer the submission by drawing attention to the fact that while travel to the conference was first mentioned in May 2002, duty travel to the conference was not confirmed until mid-July 2003 after the formal invitation to the complainant was extended by a letter dated 11 June 2003. However this is really an *ex post facto* rationalisation, and not a compelling one, of what is obvious, namely that at the time the family travel was arranged, the conference travel was arranged as well even if only tentatively. The Tribunal draws the inference that the complainant planned his family travel to coincide with the conference travel and did so with at least the possibility of gaining some financial advantage.

9. In his pleas, the complainant refers to a number of matters that are really irrelevant, at least on the facts of this case. They include his lack of knowledge of the applicable rules concerning travel and its financing, whether the rules prevented him taking leave with duty travel and, if so, whether he knew this in 2003 (particularly having regard to the fact that he did so in 2001) and that the certification process he was involved in was not the appropriate way of acquitting travel of the type undertaken. They are really irrelevant because fraud

depends on an intention to obtain financial advantage by deception. As already discussed, by signing the certificate on the family TEC, the complainant, as a matter of fact, engaged in fraud.

10. In his brief the complainant contends there was a breach of due process in relation to the investigation by AUD and that the decision to dismiss him breached the principle of proportionality and constituted unequal treatment. The Tribunal's conclusion that the complainant engaged in fraud does not depend on answers he gave in the investigation by AUD. The decision to dismiss the complainant was not disproportionate. The Tribunal accepts that the remedy of dismissal would not have been the only remedy available to the FAO. But the conduct of the complainant involved a serious transgression of a basic obligation of international civil servants to behave honestly in their dealings with their employer.

11. The complainant seeks moral damages for the delay in finalising his internal appeal. The appeal with the JAC was lodged on 13 November 2009 and it was not until December 2011 that the Director General made his decision in relation to the appeal, namely, to dismiss it (the JAB had reported in April 2011). In its reply, the FAO argues that the complainant suffered no prejudice by the length of time the appeal took and, in any event, the delays were the consequence of workload and staffing difficulties. It cannot be doubted that in relation to serious allegations such as fraud, the participants in the internal appeal process (particularly the administration and the appeal panel) must proceed cautiously and thoroughly. However, ordinarily a staff member who has been dismissed for engaging in fraud, would suffer considerable stress while waiting for the answer in an internal appeal about whether the challenged finding of fraud would be upheld or rejected. There is no reason to doubt that this would have been so in the present case. The internal appeal did take too long and the complainant is entitled to moral damages which the Tribunal assesses in the sum of 2,000 euros. However, this was only very much a subsidiary part of the complaint and, in substance, the complainant has failed. Accordingly the complainant is not entitled to costs.

DECISION

For the above reasons,

1. The FAO shall pay the complainant 2,000 euros moral damages for the delay in the internal appeal.
2. All other claims are dismissed.

In witness of this judgment, adopted on 5 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO  
DOLORES M. HANSEN  
MICHAEL F. MOORE

DRAŽEN PETROVIĆ