

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

P.
v.
FAO

123rd Session

Judgment No. 3743

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs M. L. B. P. against the Food and Agriculture Organization of the United Nations (FAO) on 19 February 2014, the FAO's reply of 12 June, the complainant's rejoinder of 4 August, corrected on 6 August, and the FAO's surrejoinder of 1 December 2014;

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 may be summed up as follows:

The complainant challenges the non-renewal of her fixed-term contract.

The complainant joined the FAO Representation in Sri Lanka in April 1998 under a fixed-term contract which was extended several times. At the material time she was employed as an Administrative Clerk (Accounting) at grade G-5. In November 2007 the Assistant FAO Representative, who was the complainant's first-level supervisor, completed her performance evaluation for 2007. In the Performance Evaluation and Extension of Appointment (PEEA) form used for that purpose he made positive comments about her work in general but stated that she needed to improve her communication skills. The complainant provided her comments and the FAO Representative, her

second-level supervisor, signed the PEEA form and recommended an extension of her appointment. The complainant's appointment was subsequently renewed for two years until 31 December 2009.

In a memorandum to the complainant of 8 August 2009 the new FAO Representative set out what he considered to be ongoing problems concerning her interactions with colleagues. He warned her that unless there was a marked improvement in her behaviour, her contract would not be extended beyond 31 December 2009.

In August 2009 the complainant received a negative performance evaluation, apparently for the years 2008 and 2009. The complainant asserted that this evaluation was motivated by malice and constituted retaliation for allegations of misconduct that she had made as a consequence of her discovery of violations of the FAO Regulations. The FAO Representative, her second-level supervisor, signed the evaluation on 8 October 2009, indicating that he disagreed with the complainant's comments. He recommended that her appointment be extended for three months, though in the event she received a one-year extension, until 31 December 2010.

On 5 November 2009 the complainant wrote to the Administration raising allegations of harassment against her first-level supervisor. In accordance with the FAO's Policy on the Prevention of Harassment (Administrative Circular No. 2007/05.E of 23 January 2007), a copy of the harassment complaint was forwarded to her first-level supervisor, who was invited to respond. In March 2010 the harassment complaint was referred to an Investigation Panel. In its report of 21 July 2010, the Panel found that there had been harassment only by way of the complainant's exclusion from normal office communications. Both the complainant and her supervisor were given an opportunity to comment on the report.

The complainant's performance evaluation for 2010 was again negative. In an e-mail of 14 December to the FAO Representative the complainant stated that her supervisor's comments in that evaluation were biased, motivated by bad faith and discriminatory. The complainant's appointment, which was due to expire on 31 December 2010, was extended for one month to 31 January 2011.

On 15 January 2011, having added his comments to the 2010 evaluation, the FAO Representative sent a copy of it to the complainant and requested that they meet to discuss the matter. He indicated on the PEEA form that he supported the first-level supervisor's assessment and that he saw no option but to end the complainant's contract. In an e-mail of 23 January the complainant categorically rejected the comments in the 2010 PEEA and reiterated that she was a victim of harassment. At a subsequent meeting with the complainant the FAO Representative suggested that the complainant participate in mediation.

By a memorandum of 25 January 2011 the Director of the Human Resources Management Division (CSH), after having considered the findings of the Investigation Panel and the comments made by the complainant and her first-level supervisor, informed the complainant of his decision on her harassment complaint. He concluded that her first-level supervisor's actions in directing two staff members to limit their interactions with her violated the FAO's Policy on the Prevention of Harassment and he explained that appropriate administrative action would be taken to ensure that such behaviour did not recur. He asked the complainant to consider mediation in order to resolve her difficulties with her supervisor and requested that she indicate within five days whether she was prepared to enter into mediation. The complainant did not appeal that decision.

On 31 January 2011 the complainant was notified that her contract was extended until 30 June 2011. In the memorandum informing her of this extension it was stated that renewal of an appointment was subject to, among other things, satisfactory performance. She was requested to reconsider the possibility of mediation and it was explained that her performance and behaviour would be regularly monitored.

On 1 June 2011 the complainant's first-level supervisor sent her a PEEA for the period from 1 January to 30 May 2011; his appraisal reiterated his previous negative comments. The complainant's appointment was extended until 31 August 2011 to allow sufficient time to complete the evaluation process. Her second-level supervisor provided his comments on the PEEA on 27 July 2011. He subsequently recommended that her

appointment should not be extended beyond its expiry date of 31 August 2011.

In a letter of 30 August 2011 to her second-level supervisor, the complainant asserted that this recommendation was motivated by bad faith and malice, and was unfounded. On 31 August she was notified that her appointment would be extended until 30 September so that the CSH could review her letter of 30 August prior to taking a decision.

On 28 September 2011 the Director of CSH informed the complainant that he had decided not to renew her appointment on the grounds that her service was not satisfactory. Consequently, she would be separated from service upon the expiry of her contract on 30 September 2011 and she would receive a payment of one month's salary in lieu of notice.

The complainant requested the Director-General to review that decision but her request was dismissed as without merit. In February 2012 she filed an appeal with the Appeals Committee. The Appeals Committee issued its report on 21 June 2013. A majority of the Committee members considered that the decision not to renew the complainant's appointment, as well as the process leading up to that decision, had failed to take into consideration all the facts and circumstances, including management lapses that had led to a large-scale fraud being perpetrated against the FAO. The process had focused on the complainant's performance and behaviour instead of examining the broader context in which her relationship with her colleagues and supervisors had degenerated. A majority of the members further considered that the process had been tainted by abuse and that the FAO had failed in its duty of care towards the complainant. They recommended that the decision not to extend the complainant's appointment should be set aside and that the FAO should determine an appropriate remedy for her, but that her other claims and requests should be dismissed. One member of the Committee issued a dissenting opinion.

By a letter of 11 November 2013 the Director-General informed the complainant that he had decided to reject the Appeals Committee's recommendation to set aside the decision not to extend her appointment and to determine an appropriate remedy, and to accept the recommendation

to dismiss her other claims and requests. He accordingly dismissed her appeal as without merit. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision. She seeks her immediate reinstatement and/or an extension of contract at grade 5 in the FAO Representation in Sri Lanka. She claims her salary with retroactive effect to 1 October 2011, material damages in the amount of 36,000 United States dollars, moral damages in the amount of 25,000 dollars, costs in the amount of 7,500 dollars, and any other relief the Tribunal deems meet.

The FAO asks the Tribunal to reject the complaint *in toto*.

CONSIDERATIONS

1. On 28 September 2011, the complainant was informed that there would be no further extension of her fixed-term contract notwithstanding that she had been employed by the FAO since 10 April 1998. In the result, she separated from the FAO on 30 September 2011. On 12 October 2011 the complainant appealed to the Director-General against this decision but she was unsuccessful. By a memorandum of appeal dated 15 February 2012, the complainant lodged an appeal with the Appeals Committee. The Appeals Committee provided the Director-General with two reports, one dated 21 June 2013 which enclosed the other which was undated. The former was a report from the four-member majority of the Appeals Committee and the latter was a report from one member who dissented.

The majority recommended that the decision not to extend the complainant's appointment be set aside "leaving it to the [FAO] to determine the appropriate remedy for the [complainant]" but otherwise recommended that the complainant's other claims and requests be dismissed. The dissenting member recommended that the complainant's appeal be rejected as without merit. On 11 November 2013, the Director-General wrote to the complainant saying that he had decided to reject the Appeals Committee's recommendation to set aside the decision not to extend her appointment and had decided to dismiss her appeal as without merit. This is the decision impugned in these proceedings.

2. Largely, the issues raised in these proceedings should be determined by the application of two principles from the Tribunal's jurisprudence. The first is that an organisation has a wide discretion in deciding whether to renew a fixed-term appointment and its right to refuse to renew can be based on unsatisfactory performance (see, for example, Judgments 892, consideration 8, 1405, consideration 4, 1441, consideration 18, and 1711, consideration 4). Nonetheless such a discretionary decision can be successfully impugned if it is fatally flawed by, for example, procedural defects, a failure to take account of some essential fact, abuse or misuse of authority, or if it was based on an error of fact or of law (see, for example, Judgment 3626, consideration 10).

3. The second principle is that the executive head of an international organisation is under a duty to provide reasons for rejecting a recommendation by an internal appeal body (see, for example, Judgment 3208, consideration 11). It is convenient to consider first the operation of that principle in this case. In the impugned decision of 11 November 2013, the Director-General summarised, in some detail over several pages, various conclusions of the majority of the Appeals Committee underpinning its recommendation to set aside the decision not to renew the complainant's contract. He also summarised conclusions of the dissenting member that, in several respects, challenged the conclusions of the majority. The Director-General then identified what were, in substance, four errors he perceived in the approach and reasoning of the majority. The first concerned a view of the majority that it was necessary to look at the broader context in which criticisms of the complainant's conduct first arose in 2007 and continued in the following four years. The majority believed that to focus on the complainant as the source of disharmony in the office (particularly as revealed in various reviews of her performance in that period) was simplistic given the discovery of major fraud in October 2008 and that the complainant "had contributed, at least to a certain extent, to the discovery" of the fraud and that she had earlier "taken action by signalling and fighting problems when [the complainant] had believed to be in the presence of anomalies and irregularities".

The Director-General rejected this approach as not supported by the evidence. He noted that both her second-level and first-level supervisor were in regular direct contact with the complainant and were best placed to evaluate her performance on her assigned duties as well as to observe her conduct in the office. It was in that context that her performance was appraised as less than satisfactory. What the Director-General said on this topic was unexceptionable and justified a rejection of the conclusion of the majority. It is true, as the majority of the Appeals Committee said, that there was a context in which the complainant was performing her duties. The majority may have been saying (but did not do so expressly) that the complainant was assiduously and energetically performing her duties to ensure that no fraud occurred or was repeated and this had the effect of aggravating others in the office who may not have believed such a rigorous approach was necessary or that it had the effect of encroaching on work which was their responsibility. However the criticisms of the complainant's performance were, fundamentally, concerned with her style or manner of communication and attitude. It was open to her supervisors and ultimately the Director-General to focus on this aspect of the complainant's performance and conduct and to look to its consequences in assessing whether her performance was satisfactory.

4. The second perceived error in the reasoning and approach of the majority of the Appeals Committee identified by the Director-General concerned its analysis of the Investigation Panel's consideration of the complainant's allegations of harassment. The majority had said, in effect, that the Investigation Panel (which investigated the allegations of harassment and its work is discussed in more detail later) should have examined whether there was a causal link between the discovery of the fraud and the difficulties between the complainant and her colleagues in general. What this means is entirely obscure and is not explained by the majority. The Director-General was entitled, as he did, to reject this proposition and to take the approach that the complaint of harassment had been thoroughly investigated by the Investigation Panel and appropriate conclusions reached including that the complainant had been harassed by her first-level supervisor that resulted in a sanction against him.

5. The third perceived error concerned a statement of the Appeals Committee that it was “plausible that the [complainant], in light of her functions, her long experience and her competency, had contributed, at least to a certain extent, to the discovery of the [...] fraud case in October 2008”. The Director-General said the majority erred in making this finding. There is, of course, the immediate difficulty of ascertaining precisely what the majority was saying. To say, in this type of context, that something is “plausible” is really only the acknowledgement of a possibility that is not irrational or unbelievable. That acknowledgement is diluted by the qualification in the expression “at least to a certain extent”. In any event, if the Appeals Committee was suggesting that the complainant had laid the groundwork, in whole or in part, which led to the revelation of the fraud, this suggestion leads nowhere unless it could be said that the complainant had been a whistleblower. But, as the Director-General noted in his critique, that conclusion was rejected by the Office of Inspector General (which investigated the fraud) and the Investigation Panel and this, in fact, was acknowledged by the majority in this section of the report. The Director-General was justified in criticising this aspect of the report of the majority.

6. The last perceived error concerned a conclusion of the majority that the process leading up to the decision not to renew the complainant’s appointment had been “tainted with abuse”. The Director-General simply said there was no foundation for this view. In its report the majority noted that the Investigation Panel had found that the complainant’s first-level supervisor had harassed the complainant by requesting other staff members not to communicate with her and this supported the claim that abuse by him had occurred. It may be accepted that the Director-General’s reasoning on this point is scant. That said, the majority’s observation must be taken to have addressed an argument of the complainant in the internal appeal summarised in the report that the process used to separate the complainant “was abusive in that she was subjected to ‘*intimidation*’, with ‘*short and ad-hoc contract extensions*’, and to ‘*undue pressure*’, with short notices to provide responses”. There was no logical connection between the abuse identified by the majority in its conclusion on the topic of the process being tainted by abuse and

the argument that the complainant had advanced. The Tribunal is not satisfied that the brevity of the Director-General's reasons for rejecting the majority's conclusion about abuse is material because the conclusion itself does not relate to the case that the complainant had sought to make out in the internal appeal. As to the Director-General's reasons more generally, the Tribunal is satisfied that he sufficiently explained the reasons for rejecting the recommendation and conclusions of the majority of the Appeals Committee and his reasons for upholding the decision not to renew the complainant's contract. Those reasons were based on the evaluation of the complainant's performance which had consistently been appraised by both her supervisors as being less than satisfactory over an extended period.

7. It follows that the Director-General exercised a discretionary power to decide not to extend the complainant's contract for unsatisfactory performance. As discussed earlier, the exercise of such a power can only be successfully impugned if it is fatally flawed, for example, by procedural defects, a failure to take account of some essential fact or misuse of authority. In her brief, the complainant argues that the decision was "arbitrary, capricious, unreasonable, without reason or basis, illegal and unlawful".

8. The gravamen of the complainant's argument is that she performed her duties diligently and conscientiously but, notwithstanding, this triggered negative and hostile responses from those with whom she worked including her supervisors. This is exemplified by her response in a letter dated 12 August 2009 to a letter dated 8 August 2009 she had been sent by the FAO Representative. In the latter letter, the FAO Representative listed five deficiencies he perceived in her behaviour or conduct. The first was that she "ha[d] a negative attitude towards [her] immediate colleagues and d[id] not communicate with them", nor was work properly shared. The FAO Representative concluded the letter by saying: "[w]e are working to build a solid team of competent staff to strengthen the role and effectiveness of FAO in Sri Lanka. You are proving to be a non-team player during this critical juncture and worst still is the fact [that] you are upsetting other staff with your negative attitude."

The complainant's response in her letter of 12 August 2009 commenced with a statement that she "categorically and vehemently den[ied] the baseless and unfounded allegations levelled against [her]". She later said in the letter:

"I am constrain[ed] to point out that the allegations against me have been formulated with sinister motives and in extreme bad faith, only after I have brought to the notice of my colleagues, supervisors and yourself the serious and grave irregularities that have taken place, which are not only in violation of accepted financial procedures but, are clearly indicative of fraud on the part of several people who may be linked to the organization.

Numerous instances have been brought to the notice of my supervisors and colleagues, where procurement process of the organization have been followed with utter disregard for accepted norms, and in the absence of supporting documents, and undue prioritisation of approving and effecting payments, and primarily procuring from ad-hoc suppliers without proper accreditation or back ground checks, who have been supplying goods to the organization as shadow suppliers, while being directly employed in the organization. I have also on numerous occasions voiced my concern that such irregular or illegal activities cannot take place in the absence of collusion of several insiders in the organization."

9. The complainant's perception of the response of others to her work as being the manifestation of "sinister motives and in extreme bad faith" was raised by a complaint of harassment made to FAO Headquarters in Rome in a letter of 5 November 2009. After recounting some of the history of her experiences and activities she referred to the letter of 12 August 2009 and characterised what had happened as "**harassment and intimidation solely as a result of acting in accordance within [her] duty of loyalty to FAO, to ensure that the prescribed policies and procedures of the organization are fully adhered to and that the breakdown in the system of internal control is immediately reported**" (original in bold). In due course, this complaint resulted in the constitution of an Investigation Panel that treated the complaint as one against her first-level supervisor. Two members of the Investigation Panel travelled to Sri Lanka in May 2010 and investigated, over several days, the complaint. In its report of 21 July 2010, the Investigation Panel noted that after a few days of intense talks it had become apparent that there was scope for mediation. It also noted that the complainant's

first-level supervisor agreed but ultimately the complainant indicated she did not wish to participate in mediation.

10. The Investigation Panel's report contained some commentary that indicated the complainant had been inappropriately treated and, indeed, the Panel found that she had been harassed by being excluded from normal office communications. However, it made no finding supportive of the complainant's allegation that she had been the subject of retaliation because of her diligent performance of her duties exposing irregularities or fraud and it made no finding that the negative treatment to which she had been subject was the product of malice or bad faith which was a recurring theme in her responses to various negative evaluations of her work.

11. One particular event, occurring shortly before the final decision was made on or about 28 September 2011 not to extend the complainant's contract, is of importance in appreciating the approach taken by the FAO when evaluating her suitability to continue in employment with the Organization. The complainant had been accidentally sent, on 22 August 2011, a three-page letter (dated 10 August 2011) from the Chief Technical Advisor/Project Manager of a "Fishing Landing Site Project" which, it appears, was being supported by the Government of Canada and managed or overseen by the FAO. The letter was characterised as "a formal complaint" against the complainant. The letter detailed almost a dozen instances over a period from September 2010 to July 2011 in which the complainant's conduct had been perceived by the Chief Technical Advisor as inadequate or inappropriate. He characterised the conduct as involving "a lack of communication with members of [his] project team and [himself] verging on obstinacy, a refusal or obstruction to obey instructions related to payments signed off by [him], and a general lack of a professional duty of care".

12. In its reply the FAO notes that on 1 September 2011, the Director of CSH requested the complainant to provide her comments on the letter of 10 August 2011. The correspondence thereafter passing between the complainant and the Director of CSH, summarised in the reply, can fairly be characterised as involving obfuscation on the part

of the complainant and a refusal to engage in a process that might have led to a responsive analysis of the detailed and apparently substantial criticisms. Of some significance, the complainant does not adequately explain in her rejoinder either her failure to respond in a material way to the request made in September 2011 to comment on the letter, or the criticisms in the letter itself. While this event (the sending of the letter by the Chief Technical Advisor and the failure of the complainant to respond) is only one comparatively small element in the evidentiary case of the parties, it does illustrate a more general proposition that the complainant has not provided evidence and argument to persuade the Tribunal that the decision not to extend her contract was fatally flawed in the way discussed in the Tribunal's jurisprudence. The complainant bears the burden of proving malice, bad faith or misuse of authority (see, for example, Judgments 3543, consideration 20, and 3678, consideration 6). She has not done so.

13. One procedural issue should be noted. The complainant argues that under the Staff Rules, she was entitled to one month's notice on the termination of her contract and, in fact, she was not given that notice. The FAO contests the applicability of this provision to a case such as the present where the fixed-term contract expires. However this issue is moot because, in fact, the complainant was paid a month's salary in lieu of notice. In the result, the complaint should be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ