

S. F. d. M. (Nos. 1 and 2)

v.

ILO

123rd Session

Judgment No. 3777

THE ADMINISTRATIVE TRIBUNAL,

Considering the first complaint filed by Mr J. S. F. d. M. against the International Labour Organization (ILO) on 12 June 2014 and corrected on 1 July, the ILO's reply of 9 October, the complainant's rejoinder of 18 December 2014 and the ILO's surrejoinder of 19 March 2015;

Considering the second complaint filed by the complainant against the ILO on 18 July 2014, the ILO's reply of 20 October, the complainant's rejoinder of 18 December 2014 and the ILO's surrejoinder of 19 March 2015;

Considering Articles II 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 may be summed up as follows:

The complainant challenges the decision to dismiss his allegations of harassment and his performance appraisal for 2011 to 2013.

The complainant joined the International Training Centre of the ILO (hereinafter "the Centre") in May 2000 as an Assistant to the Treasurer at grade P.3. His job title was changed to Finance Officer in 2002. In parallel he took up some duties as staff representative and, in April 2013, he was appointed President of the Staff Union Committee.

At the end of March 2013 the Human Resources Services of the Centre wrote an email to Ms D., the complainant's responsible chief, asking her to appraise his performance for the period 1 February 2011 to 31 January 2013. The complainant and his responsible chief disagreed on the comments to be made, but the complainant finally signed the performance appraisal in early September appending his detailed comments.

On 14 November he filed an internal complaint with the Director of the Centre, in accordance with Article 12.2 of the Centre's Staff Regulations, alleging harassment on the part of his responsible chief. He explained that the harassment he experienced reached its peak with the issuance of a performance appraisal, which aimed at preventing any possibility of career development. He provided many examples to support his allegations of harassment. The Director informed him on 28 November 2013 that he would be temporarily reassigned from the Financial Services to the Internal Administration Service from 2 December 2013 to 31 May 2014.

The complainant's performance appraisal for the period 1 February 2011 to 31 January 2013 was transmitted to the Reports Committee that decided to hear him on 4 February 2014. Three days later, on 7 February, the Committee wrote to the Director of the Centre stating that, having examined the written documents and heard the parties, it considered that the complainant's responsible chief disproportionately reported the complainant's deficiencies in the performance appraisal. It nevertheless considered that the complainant's temporary reassignment was appropriate given the tense working relationship. It added that the complainant should use the period of reassignment to refine his skills and undertake available training to facilitate his "foreseen re-integration" in the Financial Services. However the Reports Committee did not annotate the performance appraisal until 24 March. It acknowledged the performance deficiencies reported by the complainant's responsible chief and "deem[ed] that the incumbent could take proactive steps to address the situation including access to additional training certification as [was] actually recommended by the higher level Chief". On 31 March the complainant provided observations on the comments from the Reports Committee disagreeing with them, and on 2 April initialled the Reports Committee's comments as he had been requested to do.

On 24 April the complainant filed a second internal complaint challenging the performance appraisal report, asking that it be “revoke[d]” and removed from his personal file. He also asked to be compensated for its negative impact on his career.

In May the complainant and his responsible chief were both heard separately by the Director of the Centre and the independent expert the Director had appointed to advise her on the complainant’s first internal complaint alleging harassment. They were each given the possibility to provide clarifications to add to their submissions concerning that complaint. The Director of the Centre subsequently informed the complainant on 19 May 2014 that she had reviewed all available evidence and found that his allegations of harassment raised in the internal complaint of 14 November 2013 were “insufficiently well founded”; she had therefore decided to close the file. Having noted that the fundamental elements of trust and respect, which were essential in a working relationship, no longer existed between the complainant and his responsible chief, she had decided to extend his temporary reassignment until the end of December 2014, when his responsible chief was due to retire.

On 12 June 2014 the complainant filed his first complaint with the Tribunal impugning the decision of 19 May 2014 and asking the Tribunal to set it aside and to declare the disputed performance appraisal invalid and to remove it from his personal file. He also claimed compensation for the damage suffered and 2,000 euros in costs.

The complainant then filed a second complaint before the Tribunal impugning again the decision of 19 May 2014. He asked the Tribunal to set it aside and to compensate him for the damages suffered. He also claimed 2,000 euros in costs.

On 17 July 2014, the Director of the Centre notified the complainant of her decision to dismiss his second internal complaint concerning his performance appraisal as irreceivable on the grounds that the parties, the facts and cause of action of the complaint were the same as those which were the subject of the first internal complaint with respect to which she had already made a decision on 19 May 2014.

The ILO requests that the complainant’s first and second complaints be joined. It asks the Tribunal to dismiss certain claims as not receivable

for failure to exhaust internal means of redress, and to otherwise dismiss all of the other claims as devoid of merit.

CONSIDERATIONS

1. As the two complaints impugn the same decision, they are joined and will be the subject of a single judgment.

2. In both of these complaints to the Tribunal, the complainant identifies the decision of 19 May 2014 as the impugned decision and the subject of both challenges. That decision arose from a review of the complainant's internal harassment complaint, but not from his internal complaint in which he challenged his 2011 to 2013 performance appraisal. The review procedure is provided as part of the resolution process where a staff member of the Centre complains of harassment.

3. Circular No. 13/2009 of 27 March 2009 (the Circular on harassment), which provides the Centre's policy and procedures for dealing with harassment complaints, provides an informal approach by way of mediation, as well as a formal procedure for the resolution of such complaints. Paragraph 19 of the Circular permits a staff member to call for the review or complaints procedure, described in Articles 12.1 and 12.2 of the Staff Regulations, to be followed where the formal procedure is appropriate. Paragraph 20 sets out the commencement process for the formal procedure. Paragraph 21 provides for a copy of the alleged victim's complaint to be sent by the Chief of the Human Resources Services to the alleged perpetrator who is to respond with her or his own comments and version of the facts. Paragraph 22 empowers the Director of the Centre to review all of the available evidence thereafter, and to determine, from the evidence collected, whether there were sufficient facts on which to take disciplinary measures against the alleged perpetrator, whether there was sufficient evidence to refer the matter to a Commission of Inquiry, or whether to "close the file if the accusations of the alleged victim [were] insufficiently well founded". The Director took this latter course of action.

4. In his first complaint to the Tribunal, the complainant, in effect, challenges the Director's decision of 19 May 2014 to dismiss his harassment complaint upon review of the available evidence and to close the file on that complaint and provides his internal complaint dated 24 April 2014 as the relevant appeal that relates to that decision. However, in the decision of 19 May 2014, the Director identified the complainant's internal complaint dated 14 November 2013 as the object of the review. As he does in his first complaint to the Tribunal, in his internal complaint of 24 April 2014, the complainant challenged his performance appraisal for the period 1 February 2011 to 31 January 2013 on procedural and substantive grounds. In that internal complaint, as in the first complaint before the Tribunal, he alleges harassment as one of the taints on the process of the appraisal. His related allegations do not amount to a substantive claim. They are pleas to support his harassment claim presented as elements in proof of harassment.

The Tribunal determines that the complainant received no final decision on his internal complaint challenging his performance appraisal, neither has he provided evidence that he has exhausted internal means of redress available to him in relation to it. Paragraph 1 of Article VII of the Tribunal's Statute states that a complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of redress as are open to her or him under the applicable Staff Regulations. Accordingly, the first complaint is not receivable and will be dismissed.

5. The second complaint is receivable as it challenges a final decision inasmuch as, in the impugned decision dated 19 May 2014, the Director of the Centre, in effect, dismissed the complainant's internal harassment complaint on review and closed the file, pursuant to paragraph 22 of the Circular on harassment. The merits of the complainant's second complaint to the Tribunal will therefore be considered.

6. The guiding principles of the Centre's policy on harassment outlined in the Circular on harassment declare, in paragraph 1 of the Circular, "the right of every individual to be treated with respect and dignity in the workplace and to work in an environment free from any

harassment or abuse of power”. It also declares “‘zero tolerance’ of any form of harassment”; a fast and fair settlement of all alleged cases of harassment; a flexible method for settling such allegations informally, as well as a formal procedure in sub-paragraphs (a), (c), (d), (e) and (f), respectively, of paragraph 1. Paragraph 2 of the Circular states that, in line with these principles, sexual, psychological or discrimination harassment at the workplace or in relation to work constitutes unacceptable behaviour that will not be tolerated at the Centre as it is contrary to the high standards of conduct required of all officials by Article 4.2 of the Staff Regulations and will lead to disciplinary measures. These provisions are supported and supplemented by the Tribunal’s case law.

7. The Tribunal stated the following in Judgment 3692, consideration 18:

“In Judgment 2552, under 3, the Tribunal stated that when an accusation of harassment is made, an international organisation must investigate the matter thoroughly and accord full due process and protection to the person accused. The organisation’s duty to a person who makes a claim of harassment requires that the claim be investigated both promptly and thoroughly, that the facts be determined objectively and in their overall context (see Judgment 2524), that the law be applied correctly, that due process be observed and that the person claiming, in good faith, to have been harassed not be stigmatised or victimised on that account (see Judgments 1376, under 19, 2642, under 8, and 3085, under 26).

Furthermore, the question as to whether harassment has occurred must be determined in the light of a thorough examination of all the objective circumstances surrounding the events complained of. An allegation of harassment must be borne out by specific acts, the burden of proof being on the person who pleads it, but there is no need to prove that the accused person acted with intent (see Judgments 2100, under 13, 2524, under 25, and 3233, under 6, and the case law cited therein).” See also Judgment 3065, consideration 10.

8. Paragraph 4 of the Circular on harassment defines harassment as follows:

“Harassment is deemed to be any series of actions, usually repeated, whose aim or effect is deterioration in working conditions liable to undermine the rights and lessen the dignity of the person who is the victim of them; to harm the victim’s physical and mental health; or to compromise the victim’s career prospects.”

Paragraph 6 of the Circular states as follows:

“Harassment is especially serious when it is engaged in by an official, who is in a position to influence the career or job conditions (including recruitment, duty station, contract renewal, performance appraisal or promotion) of the victim.”

Paragraph 9 of the Circular relevantly elucidates psychological harassment as follows:

“[P]sychological harassment cannot be given a straightforward definition, because the hostile acts that constitute it can easily be confused with ordinary work episodes or attitudes. The key factor that distinguishes psychological harassment from an ordinary work conflict is the constant repetition of hostile acts, or else an act being serious enough in itself to have potentially prolonged effects on the victim. It therefore consists of any abusive attitude by one or more persons designed to attack or denigrate an official, constantly and repeatedly, over a prolonged period.”

9. The complainant alleges that the actions of his responsible chief amounted to harassment, including psychological harassment, and that the harassment “has grown in intensity, reaching its peak with an appraisal form aimed at adversely affecting any possibility [he] might have of career development and professional growth within the Organization”.

10. The complainant alleges, for example, that his responsible chief has undermined his authority with officials who were under his responsibility by issuing instructions to them without informing him or discussing the matters with him beforehand and corresponded with them on various matters without even copying him on the correspondence. From this perspective, he questions her comments on his performance appraisal that he could have demonstrated a more serious commitment to working with the other staff members of the Unit and demonstrated his interest, capacity and willingness to take a more professional and leadership role in the closure of accounts. The Tribunal notes the Director’s statement, in the impugned decision, that given the legitimate demands on the complainant to attend to staff union matters and his participation in personal training it was not always practicable for all requests to staff to be channelled through him. The Tribunal also notes the complainant’s response that the Director’s statement ignores the examples which he gave as in those instances he was not busy or occupied on

either account. The complainant questions his performance appraisal on the grounds that his supervisor's evaluation contains misstatements and contradictions and insists that this was part of a pattern of harassment which was aimed at compromising his career prospects. He makes other allegations and raises various questions concerning what he refers to as "an extremely negative appraisal" and the way in which it was conducted. He also makes various allegations of what he considers was demeaning and discriminatory treatment by his responsible chief.

11. The complainant submits that his responsible chief has, on several occasions, given him illegal orders that went against the existing procedures and rules and he did not follow her "insistent and malicious orders". By way of examples of the instances, the complainant states that on 19 June 2013 she asked him to sign accounting vouchers with over 50,000 euros commitments which the Director had not signed and that this happened again on 2 August 2013. The complainant also states that in May 2013 he expressed disagreement with his Unit having to perform tasks closing the Notices of Agreed Activity (NOAAs); closing commitments or issuing invoices of accounts receivables on a permanent basis. This, he stated, was because the Director had assigned those tasks to another Unit within the Financial Services when that department was reorganized. The complainant stated, further, that again on 25 October 2013, his responsible chief insisted that he should have initialled accounting vouchers for a total of 304,785.59 euros payable to a bank, endorsing their conformity to existing rules prior to payment. He says that although the invoices supporting those vouchers had not been approved by any manager, his responsible chief indicated that he would have been responsible for any delay in the payments even though he was not authorized to sign for payments over 100,000 euros. He states that he was concerned because he had been singled out before as being responsible for a loss of 18,235 euros to the Centre, but the note which attributed that blame to him was withdrawn after he lodged an internal complaint. He states that these illegal orders were contrary to financial rules, and the fact that he pointed this out to his responsible chief "further worsened [his] position".

12. In response to the Director's finding, in the impugned decision, that it was highly unlikely that illegal orders would have gone undetected by the external auditors, the complainant states that the external auditors do not check all of the transactions and the processes involved in every instance as they certify accounts based on samples in accordance with their selected procedures, and, in the second place, they could not have detected them because the orders which he received were not given by written instructions, and, in any event, they could not have been detected as he had opposed them. He further alleges that his responsible chief always insisted that he should have checked accountancy related voucher before she initialled it, and, even if he initialled it she often refused to approve it. He referred to an email dated 11 June 2013.

13. The complainant also alleges that his responsible chief made him responsible for checking bank transactions for which he had no signatory authority, and, in this regard, referred to an email of 23 July 2013. He states that he recalls that on 2 September 2013 his responsible chief insisted that he initialled the Centre "Payment Reports" which would have identified him as the signatory of payment orders which she had prepared in his absence and further states that she constantly gave him verbal instructions and refused to sign documents or put into writing instructions which she issued to him. He alleges that these are breaches of Article 19 of the Standards of Conduct for the International Civil Service, which permits a staff member to ask for written instructions in instances in which she/he and her/his supervisor did not agree.

14. The complainant further alleges, with reference to dates of incidents and to names, that his responsible chief sometimes blamed him for mistakes which he did not make. In response to the Director's statement that procedures exist in the Financial Rules to permit staff members to bring such matters to the attention of the internal auditors or other authorities on a confidential basis, the complainant states that members of management were informed and that, in any event, he had made no mention of the Financial Rules but of the Centre's Financial Regulations. The Tribunal also notes the Director's statement, in the

impugned decision, that orders may have departed from previous operating procedures but that does not necessarily make them illegal.

15. These allegations have been detailed as, even given the responses of the complainant's responsible chief, they provide with some of the complainant's other allegations, a case which required further investigation and consideration and should have been referred to a Commission of Inquiry for the conduct of an inquiry. For the omission to refer the matter to a Commission of Inquiry, the complainant will be awarded moral damages in the amount of 15,000 euros. The impugned decision will be set aside and the case will be remitted to the Centre for the complainant's harassment complaint to be referred to a Commission of Inquiry within thirty days of the public delivery of this judgment. The complainant will be awarded 750 euros costs.

DECISION

For the above reasons,

1. The impugned decision dated 19 May 2014 is set aside.
2. The complainant's first complaint is dismissed.
3. The complainant's harassment complaint is remitted to the ILO to be referred to a Commission of Inquiry within thirty days of the public delivery of this judgment.
4. The ILO shall pay the complainant 15,000 euros in moral damages.
5. The ILO shall pay the complainant costs in the amount of 750 euros.
6. All other claims are dismissed.

In witness of this judgment, adopted on 31 October 2016, Mr Giuseppe Barbagallo, Vice-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 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ