

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

N.
v.
FAO

126th Session

Judgment No. 4011

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms B. N. against the Food and Agriculture Organization of the United Nations (FAO) on 24 May 2016 and corrected on 21 July, the FAO's reply of 7 November, corrected on 17 November 2016, the complainant's rejoinder of 31 March 2017 and the FAO's surrejoinder of 25 July 2017;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the decision to dismiss her for misconduct.

At the material time the complainant was in charge of procurement activities for the FAO Representation in Uganda. On 7 October 2011 she sent an e-mail to an unknown number of vendors requesting proposals for the supply of closed-circuit television (CCTV) and electronic access control (EAC) systems for the FAO Representation in Uganda. She subsequently transmitted four proposals containing the technical and financial bids for the installation of CCTV and EAC systems to the United Nations Department of Safety and Security (UNDSS) for evaluation. UNDSS noticed several irregularities in the bids it had received and alerted the FAO.

The Administrative Officer in the FAO Representation in Uganda, Ms E.L., who at the time was also serving as the FAO Representative *ad interim*, received the alert and informed the Office of the Inspector General (OIG) on 9 November 2011 of potential procurement fraud at the Representation in Uganda. She indicated that two of the bids clearly had been prepared by the same person and were forgeries, as confirmed by the Managing Directors of the suppliers in question. She had requested the complainant to provide the e-mails sending out the invitations to tender. The complainant provided a hard copy of an e-mail sent on 7 October 2011, but the names of the addressees were not visible as the e-mail had been sent by blind carbon copy. Ms E.L. had asked the complainant for the electronic copy but the complainant was unable to find it.

On 13 April 2012 the complainant received a notification, dated 16 December 2011, that an investigation was being conducted by the OIG into allegations that she may have engaged in unsatisfactory conduct, in particular fraudulent conduct and favouritism in procurement. On 12 June 2012 the OIG interviewed the complainant.

In its report of December 2012 the OIG concluded that the complainant had violated her duties and had failed to uphold the standards of integrity expected from an FAO staff member and an international civil servant. Specifically, she had failed to maintain transparency and had violated Manual paragraph 502.5.5 by communicating with a bidder during an ongoing procurement process, as well as by not retaining documentation in a manner that was readily available for review, in particular by deleting the e-mail of 7 October 2011. The complainant had also demonstrated gross negligence, as the evidence of manipulation and collusion between vendors would have been sufficiently obvious for her to identify had she exercised proper care in the process. However, there was insufficient evidence to determine whether the complainant had participated in the manipulation of the process. The OIG concluded that the complainant had violated the FAO Manual Section 502 on the Procurement of Goods, Works and Services, the FAO Staff Regulations (Manual Section 301) and the Standards of Conduct for the International Civil Service (Manual Section 304) and

that she had demonstrated an extreme and wilful disregard of FAO rules and regulations, amounting to unsatisfactory conduct within the meaning of Manual Section 330.

By a memorandum of 9 September 2013 the complainant was notified of the proposal to impose on her the disciplinary measure of dismissal for misconduct as a result of her breach of the procurement rules and failure to discharge her functions in the interests of the FAO. She was also informed that the investigation report could be made available to her at the offices of the FAO Representation in Uganda upon request. She was invited to submit a reply within ten working days.

The complainant replied on 30 September denying any wrongdoing. A meeting was held in October between the complainant, the FAO Representative and the Deputy FAO Representative to discuss her reply to the charges against her.

By a memorandum of 13 November 2013 the complainant was informed that her conduct constituted unsatisfactory conduct as defined in Manual paragraphs 330.1.51, 330.1.52(b), (c), (d) and (k), warranting dismissal under Manual paragraph 330.2.41(a) and (b). She was therefore dismissed for misconduct effective from the date of receipt of that memorandum, with payment in lieu of notice.

The complainant appealed to the Director-General on 22 January 2014, alleging that she had been refused a copy of the investigation report, that her dismissal was unlawful and that it was motivated by the personal interest of the FAO Representative *ad interim*. Her appeal was rejected as without merit on 31 March 2014.

On 23 May 2014 the complainant appealed against that decision before the Appeals Committee, which recommended that the decision to dismiss her be set aside and that compensation be paid to her on the following grounds: that the time taken to complete the investigation had been excessive and in breach of FAO rules and that the total length of proceedings had been unduly delayed; that there was insufficient evidence to demonstrate that the complainant had made false statements, misrepresented or committed fraud or that she had deliberately withheld documentation; that there was no evidence that her disregard of the obligation to keep records of the procurement process was wilful; that

the irregularities of the bids were not so obvious that she would have had to immediately recognize them and that the sanction of dismissal was manifestly disproportionate.

By a memorandum of 24 February 2016 the Director-General informed the complainant that he did not accept the recommendations of the Appeals Committee because he disagreed with its findings, and that he dismissed her appeal in its entirety. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order her reinstatement. She claims payment of the termination indemnity, as well as moral damages and costs. She further asks the Tribunal to order the FAO to issue a written apology and to inform all persons concerned that the decision impugned was wrongful and was reversed.

The FAO requests the Tribunal to dismiss the complaint as entirely unfounded.

CONSIDERATIONS

1. The complainant was informed of her dismissal by a memorandum dated 13 November 2013 (the dismissal memorandum). She contends that she was “unfairly dismissed for purported misconduct alleged to have involved procurement of CCTV Cameras and Access Control Systems for the Uganda Country Office” of the FAO. The Appeals Committee recommended setting aside that decision. It also recommended that the FAO provide the complainant with adequate compensation, including full payment of her termination indemnity, award her moral damages for breach of her due process rights and reimburse her legal costs. In the impugned decision, dated 24 February 2016, the Director-General did not accept those recommendations. He fully explained the reasons for not doing so as the Tribunal’s case law requires (see, for example, Judgment 3968, under 19).

2. The FAO’s Uganda Representative had informed the complainant, in a memorandum dated 9 September 2013 (the proposal memorandum), of the proposal to take the disciplinary measure of

dismissal against her. He stated that the OIG had investigated the matter concerning her involvement in the tender for the supply and installation of the CCTV and EAC systems at the FAO Representation in Uganda and issued a report in December 2012. He further stated that, based on the report, it appeared that she had communicated with a vendor during the procurement process, had deliberately withheld information with respect to a tender process, and had failed to exercise proper care during that process by not reporting collusion between the vendors. The memorandum then detailed the OIG's findings and conclusions, which set out the three bases of alleged wrongdoing, the FAO's analysis of the OIG's report and the FAO's conclusion proposing disciplinary proceedings against the complainant.

3. The conclusion in the proposal memorandum stated as follows:

“The Organization considers the above findings sufficient to initiate disciplinary proceedings against you. In this regard, I wish to inform you that it is proposed, based on the foregoing, to impose on you the disciplinary measure of dismissal for misconduct pursuant to Manual paragraph 330.2.41(a), which reads as follows:

330.2.41: ‘Dismissal for misconduct is termination for unsatisfactory conduct as defined below:

- (a) Dismissal for misconduct is a termination for unsatisfactory conduct that has jeopardized, or would in the future be likely to jeopardize, the reputation of the Organization and its staff.’

The present memorandum constitutes the formal action in that respect provided for under Manual paragraph 330.3.2.

Please note that the measure is not imposed on you at this stage and that you are afforded ten (10) working days from the date of receipt of the present memorandum to submit a reply to me, pursuant to Manual paragraph 330.3.25.

The investigation report in this matter can be made available for your review at the offices of the Representation upon request.”

4. The complainant responded on 30 September 2013, but then received the dismissal memorandum of 13 November 2013. The complainant was eventually accused, as the Appeals Committee had noted, of unsatisfactory conduct as defined in Manual paragraphs 330.1.51 and 330.1.52(b), (c), (d) and (k) by:

- (1) not maintaining and retaining any records showing the vendors that were originally invited to tender, in a manner that was readily available for the FAO's review, in violation of Manual paragraph 502.5.5(b) and (c);
- (2) making false statements to Ms E.L., the FAO Representative *ad interim*, and dishonestly withholding documents, in particular the original e-mail of 7 October 2011, in violation of Manual paragraph 502.5.5(c); and
- (3) forwarding in a manner that was grossly negligent the bid proposals to UNDSS without a basic prior review, in violation of Manual paragraph 502.5.1.

5. Manual paragraphs 330.1.51 and 330.1.52 define unsatisfactory conduct, and Manual paragraph 330.2.41(b) explains the grounds on which a staff member may be dismissed for misconduct. Manual paragraph 330.1.51 states that unsatisfactory conduct is conduct which is incompatible with a staff member's undertaken or implied obligation to the Organization or failure to comply with the requirements of Article I of the Staff Regulations. The non-exhaustive examples of unsatisfactory conduct mentioned in Manual paragraph 330.1.52 include:

- “(b) Abuse of authority or trust to the detriment of the Organization, or any conduct of such character which is detrimental to the name of the Organization.
- (c) False statement, misrepresentation or fraud, whether oral or written, pertaining to official matters.
- (d) Any action calculated to impede the effective operation of the Organization.
- [...]
- (k) Lack of neutrality, and comparable failure to conform with the requirements set forth in Article I [...] of the Staff Regulations [...].”

Manual paragraph 330.2.41(b) states as follows:

“Dismissal for misconduct involving misrepresentation is a termination when it is found that a staff member has, prior or subsequent to appointment, deliberately misled the Organization through false statements, misrepresentation or fraud (including any false statement on, or misleading omission from, a Personal History Form, or a medical declaration form) which are of such a nature that, had the truth been known, there is a strong

presumption that the candidate would not have been appointed or that the action contemplated by the Organization would not have been taken.”

6. Consistent precedent has it that disciplinary decisions are within the discretionary authority of the executive head of an international organization and are subject to only limited review. In Judgment 3297, consideration 8, the Tribunal stated that it will interfere only if the decision is tainted by a procedural or substantive flaw. Additionally, the Tribunal will not interfere with the findings of an investigative body unless there is manifest error (see, for example, Judgment 3872, consideration 2).

7. The complainant challenges the impugned decision on procedural and substantive grounds. On the substantive grounds, she contends that the decision to dismiss her was based on insufficient evidence and that, in any event, it was disproportionate. She further contends that the decision was based on discrimination, prejudice, personal vendetta and bias against her by Ms E.L., which claims are unfounded as the complainant, who bears the burden of proving them, has not presented evidence to substantiate them. Neither has she substantiated her allegation that the FAO and Ms E.L. conspired against her.

On the procedural grounds, the complainant contends that the decision to dismiss her was taken in breach of her right to due process, including the violation of her right to be granted a fair hearing, and in breach of FAO’s rules, which, according to her, amounted to procedural impropriety. She also claims that there was inordinate delay in the disciplinary proceedings. This latter claim is well founded as the completion of the proceedings took too long and violated the FAO’s rules, which provided time limits within which certain steps should have been taken.

8. The question whether there was a breach of due process is to be determined by reference to the applicable rules and principles. As to the applicable rules, Staff Rule 303.0.1 empowers the Director-General to impose disciplinary measures, including dismissal for misconduct, on staff members whose conduct is unsatisfactory. FAO Manual

paragraph 330.1.3 states that the purpose of disciplinary measures is to protect the integrity and efficiency of the FAO. However, it further states that such measures are not to be imposed without a thorough investigation of the facts and without affording the staff member concerned an opportunity to state her or his case to the responsible officer.

Additionally, Administrative Circular No. 2011/04 on Guidelines for Internal Administrative Investigations by the Office of the Inspector-General (the Guidelines) and Administrative Circular No. 2008/26 entitled “Policy on the Use of the Organization’s Information Technology Resources”, including its Annex 1 on the Procedure for Access to Electronic Data by the Office of the Inspector-General in the Course of Administrative Investigations (the Electronic Access Procedure), provide the procedures which are to be followed for investigating disciplinary matters.

9. The basic applicable principles regarding the right to due process at the investigative stage of disciplinary proceedings were stated by the Tribunal as follows in Judgment 2771, consideration 15:

“The general requirement with respect to due process in relation to an investigation – that being the function performed by the Investigation Panel in this case – is as set out in Judgment 2475, namely, that the ‘investigation be conducted in a manner designed to ascertain all relevant facts without compromising the good name of the employee and that the employee be given an opportunity to test the evidence put against him or her and to answer the charge made’. At least that is so where no procedure is prescribed. Where, as here, there is a prescribed procedure, that procedure must be observed. Additionally, it is necessary that there be a fair investigation, in the sense described in Judgment 2475 and that there be an opportunity to answer the evidence and the charges.”

However, due process must also be observed at all other stages of disciplinary proceedings. Accordingly, the following was stated in Judgment 2786, consideration 13:

“Due process requires that a staff member accused of misconduct be given an opportunity to test the evidence relied upon and, if he or she so wishes, to produce evidence to the contrary. The right to make a defence is necessarily a right to defend oneself before an adverse decision is made, whether by a disciplinary body or the deciding authority (see Judgment 2496, under 7).”

10. The memorandum by which the OIG notified the complainant of the investigation is dated 16 December 2011. It is however noted that the Investigations Unit of the OIG had requested the Administration to create a full backup of the FAO Representation in Uganda server tapes on 18 November 2011 and that the memorandum dated 16 December 2011 was drawn up to notify the complainant of the electronic seizure of documents related to her work from the server. The complainant states that she did not receive notification of the investigation until 13 April 2012. The FAO states that this and other delays in the investigation resulted from difficulties in accessing the data from the backup server tapes and that the software incompatibility which caused the delay was eventually resolved in April 2012. The FAO states that once the difficulty was resolved in April 2012, the OIG informed the complainant that she was under investigation, provided her with a notification of investigation of electronic search, and began to view the data available on the server related to the complainant. In the Tribunal's view, this explanation may excuse the delay in notifying the complainant of the electronic search, because paragraph 8 of the Electronic Access Procedure states that the person concerned shall be informed of the access to her or his individual user account in writing, in advance, "whenever possible". It does not however excuse non-compliance with paragraph 26 of the Guidelines, which required that notification of the investigation was to be given to her, in writing, "as soon as reasonably practicable but not later than 15 days after [the OIG] had[d] decided to initiate an investigation". The investigative process violated paragraph 26 of the Guidelines.

11. Paragraph 26 of the Guidelines also states that the OIG "will normally complete its investigation and submit its report to the Director-General within 120 days of the notification to the subject of the investigation". Paragraph 27 provides that where there is an unavoidable delay, the subject is to be notified of this in writing and informed when the investigation will be completed. The complainant was notified of the investigation in April 2012. The investigation report was submitted to the Director-General in December 2012, about eight months after notification. In violation of these paragraphs, the

complainant was not notified of the delay in writing or informed when the investigation would be completed.

12. FAO Manual paragraph 330.1.3 states that disciplinary measures are not to be imposed without a thorough investigation of the facts. Paragraph 43 of the Guidelines entitles a person who is the subject of an investigation “to an impartial, objective and thorough investigation into any allegations against him/her”. Under paragraph 29 of the Guidelines, an investigation entails the collection, examination and analysis of evidence, both inculpatory and exculpatory, and may include interviews of complainants, witnesses, technical experts and the subject of the investigation. In the Tribunal’s view, in breach of these provisions, a thorough investigation was not conducted in this matter.

13. Ms E.L. provided evidence, but the OIG has neither fully reproduced her evidence nor provided a transcript of it. The complainant was interviewed and a transcript of that interview has been provided to the Tribunal by the FAO in its reply. It is considered that inasmuch as they were the only persons from whom evidence was taken during the investigation, and they made statements which contradicted each other in critical material particulars, it was necessary to have had their statements fully reproduced. In any event, that circumstance required the evidence to have been properly tested to permit the OIG to determine the truth dispassionately.

It is noted, for example, that the first charge which was eventually proffered against the complainant relates to her failure to maintain and retain records in a manner that was readily available for the FAO’s review. The second charge relates to her making false statements to Ms E.L. and dishonestly withholding documents. The complainant’s case is that she had turned the dossier with the relevant materials over to Ms E.L. She states that she so informed the OIG. However, the Tribunal cannot determine whether she did as her evidence was not fully reproduced. In the Tribunal’s view, the material contradictions in their evidence required providing the complainant with an opportunity to challenge Ms E.L.’s statements. The failure to provide that opportunity at any stage of the disciplinary proceedings breached the

complainant's due process rights. Accordingly, these charges could not have been proved beyond a reasonable doubt as the Tribunal's case law requires (see, for example, Judgment 3882, under 14).

14. The third charge, namely that the complainant acted negligently in forwarding the bids to the UNDSS without having first carefully screened them, is not however tainted by the foregoing breaches. A careful screening of them should have revealed to her the irregularity in the bids before she dispatched them to the UNDSS. However, as the Appeals Committee correctly found, imposing the disciplinary measure of dismissal upon the complainant for this was manifestly out of proportion to the breach of the FAO's rules. The Tribunal notes in this regard the Appeals Committee's observation that the procurement took place under the time pressure as well as its reference to the FAO's past practice in disciplinary matters, as reported for example in Administrative Circular 2011/2012*, including a case in which a staff member who did not follow the procurement rules, resulting in favouritism in procurement activities, was suspended for one month without pay. The complainant was therefore unlawfully dismissed.

15. In the foregoing premises, the impugned decision dated 24 February 2016 will be set aside, as will the original decision of 13 November 2013 to dismiss the complainant. However, the Tribunal has no competence to issue a "[c]ommunication to all the people who were informed of [her] dismissal that it was wrongful and has been reversed" or to order the written apologies, which the complainant requests.

16. The complainant's appointment, but for her dismissal, was due to expire on 31 July 2014. In those circumstances, it is inappropriate to order her reinstatement (see Judgment 3908, consideration 21). Nonetheless, she is entitled to moral and material damages for the breach of her right to due process and unlawful dismissal. The Tribunal will award her 25,000 United States dollars in moral damages. She will also be awarded 35,000 dollars as material damages for the income loss

* *Recte*: Administrative Circular No. 2013/17.

she suffered as a result of her unlawful dismissal and for the lost opportunity to remain in the employment of the FAO after the expiration of her contractual term. The complainant is also entitled to costs which the Tribunal sets at 7,000 dollars.

17. In the circumstances, it is not necessary to hold oral proceedings as requested by the complainant.

DECISION

For the above reasons,

1. The impugned decision dated 24 February 2016 is set aside, as is the original decision of 13 November 2013 to dismiss the complainant.
2. The FAO shall pay the complainant 35,000 United States dollars in material damages.
3. The FAO shall pay the complainant moral damages in the amount of 25,000 United States dollars.
4. It shall also pay her 7,000 United States dollars in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 11 May 2018, 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 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ