

S. (Nos. 2 and 3)

v.

FAO

127th Session

Judgment No. 4065

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr H. S. against the Food and Agriculture Organization of the United Nations (FAO) on 14 June 2016 and corrected on 14 July, the FAO's reply of 27 October, corrected on 4 November 2016, the complainant's rejoinder of 3 February 2017, the FAO's surrejoinder of 22 May, the complainant's additional submissions of 4 October, corrected on 12 October, and the FAO's final comments thereon of 30 November 2017;

Considering the third complaint filed by Mr H. S. against the FAO on 14 June 2016 and corrected on 14 July, the FAO's reply of 27 October 2016, the complainant's rejoinder of 30 May 2017, corrected on 30 January 2018, and the FAO's surrejoinder of 29 May 2018;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

In his second complaint the complainant challenges the decision to dismiss him, while he was on sick leave, for misconduct. In his third complaint he challenges the dismissal decision on the merits.

Facts related to these cases can also be found in Judgment 4064, concerning the complainant's first complaint, also delivered in public this day.

The complainant joined the FAO in September 2002. He was assigned to the FAO's Regional Office for the Near East and North Africa (RNE) based in Egypt.

In December 2011 the FAO Administration received an unsigned harassment complaint against the complainant, purported to be authored by numerous RNE staff members. In March two missions were undertaken to RNE, one by the Chief Medical Officer and the other jointly by the Director-General's Special Advisor and the Senior Programme Officer in the Office of Support to Decentralization. In light of the subsequent mission reports which, among other things, raised concerns about the complainant's treatment of staff, the Office of the Inspector General (OIG) was requested to conduct a mission to RNE. During its mission the OIG did not interview the complainant as he was on leave and then subsequently on certified sick leave.

In March 2012 the complainant was offered an agreed termination, which he did not accept. In April he was notified by the Administration of the decision to transfer him to another post in Budapest, Hungary.

The OIG issued its mission report in May 2012 in which it concluded that there were no indications that the complainant's actions would be sufficient to initiate a harassment investigation. In November 2012 the acting Director of the Office of Human Resources (OHR) referred the relevant part of the OIG report concerning the complainant to an Investigation Panel (IP) for review.

On 2 April 2013 the IP issued an interim progress report. It concluded that there was a legitimate basis for a complaint according to the FAO's Policy on the Prevention of Harassment and that a formal investigation should be pursued into the complainant's conduct, notwithstanding the anomalous nature of the complaint.

By a memorandum of 22 April the complainant was provided with a portion of the OIG's mission report containing observations regarding his conduct; he was informed that those observations were considered

to warrant further investigation and that they had been referred to the IP in accordance with the Policy on the Prevention of Harassment. The complainant was given the opportunity to provide comments, which he did.

The complainant was interviewed by the IP on 16 May 2013. On 21 May a draft summary of his interview was sent to him for comments, which he provided. On 22 May 2013 (after the IP had started the investigation) the RNE staff members who had submitted the (unsigned) harassment complaint sent the original complaint, now signed, to several members of the Administration. On 29 May the signed harassment complaint was given to the complainant for his comments, which he provided. It was also forwarded to the IP for consideration.

The IP forwarded its final report to the Director of OHR in December 2013; it found evidence of harassment and abuse of authority by the complainant. By a memorandum of 10 December 2013 the complainant was provided with a copy of the IP report and was asked to provide any comments that he might have within 10 working days of his receipt of the memorandum. Over the next six months he asserted numerous times that he was unable to comment, first on the basis of annual leave and then due to the fact that he was on sick leave. In early July 2014 he was again asked to provide his comments. He did so later that month and he requested the disclosure of several documents. The Director of OHR replied by an email of 24 July to which she attached numerous documents; she asked the complainant to provide any further comments within 10 working days. By an email of 1 August the complainant's representative, Ms W., informed the Administration that the complainant's medical condition prevented him from further engaging in the matter and she asserted that several of the requested documents had not been provided.

On 3 September 2014 the complainant was informed that there was sufficient evidence to conclude that he had harassed RNE staff members and abused his authority and that disciplinary action would therefore be taken against him. By a memorandum of 8 September he was notified that the Administration proposed to impose on him the disciplinary measure of dismissal for misconduct and he was given five working

days to submit his comments on the proposed measure. Ms W. provided comments on his behalf on 11 September.

On 12 September the Administration invited the complainant to discuss the matter orally on 16 September. On 15 September Ms W. informed the Administration that the complainant had been hospitalized the previous day and that his doctor had restricted any communication on the matter until he had fully recovered. On 16 September the Administration extended the invitation to discuss the matter to Ms W., in her capacity as the complainant's representative. She declined to do so on the basis that the procedure did not provide for a discussion with a staff member's representative and she clarified that she was not a lawyer.

By a memorandum of 17 September 2014 the complainant, who was then on sick leave, was informed that the disciplinary measure of dismissal for misconduct would be imposed on him with immediate effect, that he would receive payment in lieu of notice, and that no termination indemnity would be paid to him.

On 18 September Ms W. wrote to the Administration requesting reconsideration of the decision to terminate the complainant's employment and asking that the case be suspended until his medical condition allowed him to present his case. By an email of 25 September she was informed that the FAO considered that staff members could be dismissed for misconduct regardless of their sick leave status.

On 9 October 2014 the complainant lodged an appeal with the Director-General challenging the decision of 17 September 2014 on the ground that it violated his right to sick leave and he requested that any action to separate him from service be postponed for the duration of his approved medical leave. On 8 December 2014 he was informed that the appeal to the Director-General was dismissed. On 9 January 2015 the complainant lodged an appeal with the Appeals Committee in which he challenged the decision of 17 September 2014 on the basis that it violated his right to certified sick leave. While the proceedings before the Appeals Committee were ongoing, the complainant filed his second complaint with the Tribunal, impugning the decision of 17 September 2014.

In the meantime, on 14 November 2014, the complainant submitted an appeal to the Director-General challenging, on the merits, the 17 September 2014 decision. On 12 January 2015 he was informed that his appeal was dismissed. On 9 March 2015 he lodged an appeal with the Appeals Committee challenging the decision of 12 January. While the internal appeal proceedings were ongoing, he submitted his third complaint to the Tribunal, impugning, on the complaint form, the decision of 3 September 2014.

In his third complaint the complainant asks the Tribunal to rescind the decisions of 3, 8 and 12 September 2014, to order the FAO to issue an official announcement to clear his reputation and to award him moral damages for institutional harassment. He seeks compensation for the destruction of his career and inability to secure further employment within the United Nations (UN) system. In his second and third complaints he requests the Tribunal to rescind the decision of 17 September 2014 and to find that the FAO violated his rights, subjecting him to unnecessary stress for which he should be compensated. He asks the Tribunal to hold the officials responsible for the impugned decision accountable for their breach of the rules and regulations and for acting in bad faith. As an alternative to ordering his reinstatement with retroactive effect from 17 September 2014 until he reaches retirement age, he asks the Tribunal to order the payment to him of an amount equivalent to 22 months' salary, plus interest and all benefits. He also seeks material and moral damages, and costs.

The FAO asks the Tribunal to dismiss the complaints.

CONSIDERATIONS

1. The complainant initiated the underlying internal appeal proceedings to his second complaint on 9 October 2014 challenging the decision contained in a memorandum dated 17 September 2014. In that decision, the Administration informed him that the disciplinary measure of dismissal for misconduct would be imposed on him immediately because the FAO, on the basis of the findings and conclusions of the IP and the complainant's comments on the IP report, considered that there

was sufficient evidence to prove the allegations of harassment and abuse of authority against him. The memorandum of 17 September further stated that the complainant's comments on the IP report did not provide "any evidence or valid explanation that would justify the setting aside of [those] findings". In his second complaint the complainant challenges the dismissal decision (and ultimately the Director-General's final decision) on the ground that it violated FAO Manual provisions which entitle him to sick leave because it was taken, and his separation from service took effect, while he was on sick leave. The complainant also alleges that there was unreasonable delay in the internal appeal process and he seeks to challenge the Appeals Committee's process and report.

He further alleges that the FAO refused to investigate his allegations of harassment. He also makes allegations of harassment in his third complaint. His claims of harassment are, however, irreceivable in both complaints pursuant to Article VII, paragraph 1, of the Tribunal's Statute because there are no final decisions on them.

The complainant initiated the underlying internal appeal proceedings to his third complaint by a letter dated 14 November 2014 specifically challenging the lawfulness of the actual decision of 17 September 2014 to dismiss him.

2. The Tribunal finds it convenient to join these complaints in a single judgment as they purport to challenge the same decision (of 17 September 2014), arise from the same underlying facts and are based on legal issues that are intricately interrelated.

3. The complainant filed the present complaints with the Tribunal before the related proceedings before the Appeals Committee were concluded. The Appeals Committee subsequently issued reports on the appeals and the Director-General took final decisions on the complainant's second and third appeals on 20 April and 29 May 2017, respectively. The parties have had the opportunity to provide submissions on the final decisions. In the circumstances, the Tribunal will consider the second and third complaints as directed against the Director-General's final decisions of 20 April 2017 and 29 May 2017, respectively.

4. Replying to the third complaint, the FAO asks the Tribunal to dismiss a number of claims which the complainant raises because they are either out of time or they are new or modified claims. It is clear that the complainant's challenges to the administrative decision of April 2012 to transfer him from RNE to Budapest and to his performance appraisal report for 2006-2007 and related settlement are irreceivable as they are out of time. His purported challenge to the FAO's decision to dismiss a colleague on disciplinary grounds is irreceivable as contrary to Article II, paragraph 5, of the Tribunal's Statute because he seeks to challenge a decision which is not concerned with the non-observance of the terms of his appointment.

5. Inasmuch as the complainant challenges a disciplinary decision, it is recalled that consistent precedent has it that such decisions are within the discretionary authority of the executive head of an international organization and are subject to limited review. The Tribunal 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 in disciplinary proceedings unless there is manifest error (see, for example, Judgment 3872, under 2).

6. The complainant challenges the impugned decisions on procedural and substantive grounds. The procedural challenges focus primarily on allegations of breach of due process. The Tribunal discerns no vitiating flaws in the IP investigative process.

7. However, one issue raised by the complainant is decisive in relation to both complaints. It is convenient to address this issue immediately.

A memorandum of 3 September 2014 notified the complainant that based on the IP report it was considered that the initiation of disciplinary action against him pursuant to Manual Section 330 was appropriate because the Organization considered that his behaviour constituted harassment and abuse of authority. The memorandum stated that the FAO had decided to take appropriate action pursuant to Part II(b)(iv), (h) and (i) of the Policy on the Prevention of Harassment

and that he would be informed separately of the proposed disciplinary measure. He was informed by a memorandum of 8 September 2014 that it was considered that his conduct constituted unsatisfactory conduct as defined in Manual paragraphs 330.1.51 and 330.1.52 and that his conduct violated Staff Regulations 301.1.1 and 301.1.4 which require staff members to discharge their functions and regulate their conduct with the interest of the Organization only in view. The memorandum further informed him that his conduct was considered incompatible with his duties as an international civil servant pursuant to Section 304 of the FAO Manual which forbids harassment and abuse of authority by a staff member. He was further informed that it was proposed to impose upon him the disciplinary measure of dismissal for misconduct pursuant to Manual paragraph 330.2.41(a) and that the memorandum constituted the formal action in that respect provided for under Manual paragraph 330.3.2. He was, however, notified that the measure was not imposed at that stage and that he was given five working days from receipt of the memorandum to submit his comments with regard to the proposed measure, pursuant to Manual paragraph 330.3.25. The complainant responded on 11 September 2014.

In an email to the complainant of 12 September 2014 the Assistant Director-General ad interim CS [Corporate Services] invited him to discuss the matter on 16 September pursuant to Manual paragraph 330.3.26 but indicated that the discussion was not mandatory. The complainant's representative, Ms W., responded on his behalf informing the Administration that the complainant was hospitalised on 14 September because his medical condition had deteriorated following receipt of the email of 12 September and that his doctor had restricted any communication on the matter with him until he had fully recovered. In response the Administration invited Ms W. to discuss the matter on his behalf on 17 September 2014. Ms W. thereupon informed the Administration that the procedure did not provide for discussion with a staff member's representative and, accordingly, it was not appropriate for her to speak on the complainant's behalf. However, in a memorandum of 17 September 2014 the complainant was informed of his dismissal.

8. Manual paragraph 330.3.26 relevantly states that “[i]f a reply is received, the initiating officer (or in the case of field staff, the official designated by the initiating officer) discusses it with the staff member and any other officer directly concerned (see para. 330.1.4). He/she then forwards it, together with comments to the Director, [Human Resources Management Division] AFH [...]”. Manual paragraph 330.3.27 relevantly provides that “[t]he Director, AFH [...] may discuss the matter further with the staff member and the initiating officer”. It is observed that in the email to the complainant of 12 September 2014 the Assistant Director-General ad interim CS informed the complainant, among other things, that the discussion pursuant to Manual paragraph 330.3.26 was not mandatory. He repeated this in his email of 25 September 2014 in response to Ms W. (after she had informed him that the complainant had been hospitalised and submitted the report of his doctor and the certificate of his hospitalization). This was mistaken as the discussion under Manual paragraph 330.3.26 is mandatory because of the language of that provision, which is in contradistinction to the language contained in Manual paragraph 330.3.27. Moreover, it was intended to confer a right on the complainant to complete his defence orally in a discussion with the officer who initiated the disciplinary procedure.

This right was denied and this is a material flaw which requires setting aside the impugned decision in both complaints as well as the initial decision of 17 September 2014. The case will be remitted to the FAO to complete the process by complying with Manual paragraph 330.3.26 and the following paragraphs of the procedure. By this order the Tribunal does not intend to disturb any steps before and including the submission of the reply to the memorandum on 8 September 2014, which informed the complainant of the proposal to impose the disciplinary measure of dismissal on him. The order setting aside the 17 September 2014 decision is not intended to reinstate the complainant or confer an entitlement to salary or other emoluments from the date of the memorandum of 17 September 2014 (see Judgment 3731, under 9).

9. Regarding the complainant’s claims for damages, he suffered moral injury as a result of the non-compliance by the FAO with Manual

paragraph 330.3.26, for which he will be awarded 10,000 euros for the effect on him of being dismissed in the circumstances in which he was.

The complainant's claim that the FAO be ordered to pay him compensation, in an amount to be determined by the Tribunal, for the destruction of his career and inability to secure further employment within the UN system is irreceivable, pursuant to Article VII, paragraph 1, of the Tribunal's Statute, for failure to exhaust the internal means of redress. This is because he did not advance it in the internal appeal proceedings. Additionally, the complainant's request that the FAO hold the officials responsible for the contested decision accountable for their breach of the rules and regulations and for acting in bad faith is rejected, as is his request that the Tribunal order the FAO to issue an official announcement to clear his reputation, as the Tribunal has no jurisdiction to issue injunctions of this kind (see, for example, Judgment 2636, under 13).

10. The Tribunal agrees with the complainant, and the FAO seems to accept, that the internal appeal processes, which each took over two years to be completed, were too long. For this, the complainant will be awarded 2,000 euros in moral damages. He is also entitled to an award of costs, set at 1,000 euros.

DECISION

For the above reasons,

1. The impugned decisions of 20 April and 29 May 2017 are set aside, as is the initial decision of 17 September 2014 to dismiss the complainant.
2. The matter is remitted to the FAO in accordance with consideration 8, above.
3. The FAO shall pay the complainant moral damages in the sum of 12,000 euros.
4. It shall also pay him 1,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 1 November 2018, Mr Giuseppe Barbagallo, 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 6 February 2019.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ