

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

M.
v.
FAO

139th Session

Judgment No. 4943

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. M. against the Food and Agriculture Organization of the United Nations (FAO) on 28 February 2022, the FAO's reply of 11 July 2022, the complainant's rejoinder of 19 October 2022 and the FAO's surrejoinder of 6 February 2023;

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 case may be summed up as follows:

The complainant impugns the decision to summarily dismiss him on disciplinary grounds.

The complainant, a national of the Democratic Republic of Congo (DRC), joined the World Food Programme (WFP) – an autonomous joint subsidiary programme of the United Nations (UN) and the FAO – in 2008 as Programme Assistant on a Special Service Agreement in the DRC Country Office. In 2010, he was granted a fixed-term appointment as National Vulnerability Analysis and Mapping (VAM) Officer at the NO-A grade at the Bunia Sub-Office, DRC. In 2016, he was appointed National VAM and Monitoring and Evaluation Officer at the NO-B grade at the Kalemie Sub-Office, DRC.

In September 2015, the Office of Inspections and Investigations (OIGI) opened an investigation into allegations of diversion of funds during “a distribution of cash-via-mobile phone” implemented in December 2014 by the WFP and a contractor based in DRC, after being informed, on 3 March 2015, of discrepancies identified during a post-distribution monitoring mission, a subsequent verification mission conducted by the Bunia Sub-Office and an additional mission conducted by the WFP and the UN Office for the Coordination of Humanitarian Affairs (OCHA).

The complainant was identified, after a preliminary inquiry, as the point of origin of the beneficiary payment list used during the December distribution as well as the focal point of the activity. On 17 March 2016, OIGI informed the complainant that it had received allegations that he may have been involved in a number of wrongdoings. On 19 March 2016, OIGI interviewed the complainant and on 18 July 2016 it submitted its investigation report, in which it found that the complainant had defrauded the WFP when he (i) modified “identifiable information” to create fictitious entries, for at least 1,427 beneficiaries, on the beneficiary payment list used during the distribution; (ii) distributed cash and mobile phones to at least 464 unauthorized individuals; (iii) took unauthorized possession of 148,240 United States dollars in cash, some of which remained unaccounted for, from the contractor in violation of the contract between the contractor and the WFP; (iv) authorized the transfer of mobile phones, some of which remained unaccounted for, from the contractor to a WFP employee in violation of the contract between the contractor and the WFP; and (v) submitted a false statement of programmatic results to the WFP to conceal fraud. OIGI also found that the complainant had defrauded the WFP in relation to advanced funding he received to purchase materials to construct shelters for the distribution when he submitted inflated receipts in relation to the procurement of substandard materials, resulting in a 1,745 United States dollars loss to the WFP; however, the organization did not pursue this charge. OIGI notably concluded that there was sufficient evidence to substantiate that the complainant had “[e]ngaged in a scheme to defraud WFP of cash and mobile phones, resulting in a loss of 58,581.60 [United States dollars], including distributions to

unauthorized individuals”. It recommended that “appropriate administrative and/or disciplinary action” be taken against the complainant.

In a memorandum dated 12 January 2018, received by the complainant on 1 February 2018, the Director, Human Resources Division (HR), summarised the findings of the investigation and informed the complainant that the WFP considered that these findings were sufficiently serious to warrant the initiation of disciplinary proceedings against him. He indicated that there was evidence beyond reasonable doubt to support the charge of serious misconduct against the complainant based on the allegations that the latter: (i) “engaged in fraudulent practices allowing mobile phones and cash designated as WFP assistance to beneficiaries to remain unaccounted for;” (ii) was “grossly negligent by allowing unapproved beneficiaries to be served without the proper authorisation”; and (iii) with his conduct “exposed WFP to reputational harm vis-à-vis [his] colleagues and external parties”. The Director, HR, added that the disciplinary measure of summary dismissal was the disciplinary measure under consideration. Along with the 12 January memorandum, the complainant was provided with a redacted copy of the investigation report and was asked to respond to the charges raised therein, which he did on 13 February 2018.

By a memorandum of 14 September 2018, the Director, HR, informed the complainant of the decision to impose on him the disciplinary measure of summary dismissal. The Director, HR, explained that the complainant had not provided any information that would have warranted a reconsideration of the charges brought against him and that the Administration considered that it was established, beyond reasonable doubt, that he had committed misconduct based on the charges that he engaged in “fraudulent practices”, was grossly negligent and had exposed, with his conduct, the WFP to reputational harm vis-à-vis internal and external parties.

On 13 December 2018, the complainant filed an appeal with the WFP Executive Director against the 14 September decision. The Executive Director rejected this appeal by letter of 6 March 2019 and, on 24 April 2019, the complainant filed an appeal with the Appeals Committee requesting the reversal of the 14 September 2018 and

6 March 2019 decisions and reinstatement in his former position. Alternatively, he requested compensation in the amount of his salary entitlements until his mandatory age of separation. He also requested moral and material damages.

The Appeals Committee submitted its report on 23 June 2021. First, the Committee found that the alleged fraudulent conduct of the complainant had not been proved beyond reasonable doubt. Second, the Committee found that the complainant had engaged in negligence but not in gross negligence since such conduct “would have occurred only if it was proven beyond reasonable doubt that the [complainant] had acted alone”, which seemed “highly unlikely” to the Committee as the parties’ submissions rather pointed to a “broader network of people involved in the operation, who were allegedly negligent like the [complainant] to varying degrees”. The Appeals Committee recommended the “appeal be dismissed on the account of negligence”, to remove the charge of fraud from the complainant’s file and to pay the complainant the equivalent of his full salary and related entitlements up until the end of his contract.

By letter of 15 December 2021, the Director-General of the FAO informed the complainant of his decision to follow the Appeals Committee’s recommendation to dismiss his appeal but on different grounds and to reject the recommendation to award him compensation. In regard to the charge of fraudulent conduct, the Director-General noted that he disagreed with the Appeals Committee’s conclusions because it failed to consider the evidence demonstrating the charges brought against the complainant and found, based on the evidence on record, “including [the complainant’s] own admissions”, that the WFP had established beyond a reasonable doubt that his actions and omissions amounted to fraud. Concerning the charge of gross negligence, the Director-General disagreed with the Appeals Committee’s analysis and noted that such conduct was dependent on the complainant’s individual conduct and not on whether he acted alone. He concluded that the charge of gross negligence was established beyond a reasonable doubt. Lastly, the Director-General stated that the events in question occurred during a distribution of cash assistance to vulnerable beneficiaries, in

the presence of WFP colleagues, community representatives and external parties using resources provided by donors for which the WFP is accountable and, as such, the charge of reputational harm was established. The Director-General concluded that all charges were established to the required standard and decided to reject the appeal as unfounded. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to reinstate him in his former position. In the alternative, he requests the Tribunal to order his reinstatement with a demotion in grade from NO-B to NO-A or, if reinstatement is not possible, to order the Organization to pay appropriate compensation in lieu of reinstatement, in an amount to be determined by the Tribunal. The complainant also requests the Tribunal to order compensation for material damages for all salaries, benefits, entitlements and emoluments which he lost from the date of his summary dismissal to the date of his reinstatement or to a date to be determined by the Tribunal in the event reinstatement is not possible, as well as compensation for moral damages, in an amount to be determined by the Tribunal. Lastly, he requests costs incurred during the internal proceedings and before the Tribunal in the amount of 8,000 United States dollars.

The Organization asks the Tribunal to dismiss the complaint in its entirety and to deny each of the claims for relief submitted by the complainant.

CONSIDERATIONS

1. The complainant was a member of staff of the World Food Programme (WFP) until his summary dismissal in September 2018. The general background is sufficiently set out earlier in this judgment and need not be repeated. Suffice it to note that the complainant challenged his dismissal culminating in an internal appeal heard by the Appeals Committee which issued its report on 23 June 2021. It said the charged conduct of fraud and gross negligence had not been proved but was satisfied the complainant had been negligent. Accordingly, it considered the appeal should be dismissed “on the account of negligence”

and recommended to remove the charge of fraud from the complainant's file and to award him compensation. The Director-General did dismiss the appeal, as recommended, in the impugned decision of 15 December 2021. However, he based his decision on different grounds, disagreeing with the conclusions of the Appeals Committee both on the question of fraud and gross negligence. He was satisfied there had been fraud and gross negligence which underpinned his decision to dismiss the appeal.

2. The Appeals Committee, constituted by five members, concluded on the material before it, as noted in its report, that it "did not agree with the [WFP] that the fraudulent conduct of the [complainant] had been proved beyond a reasonable doubt". It had noted, earlier in its report, that the complainant disputed all findings that he had "manipulated the list of beneficiaries". In the impugned decision, the Director-General disagreed with this conclusion concerning the proof of fraud and found: "based on the evidence on record, including [the complainant's] own admissions, [...] that the [WFP had] established beyond a reasonable doubt that [the complainant's] actions and omissions amounted to fraud". In the paragraph in the impugned decision preceding this conclusion, the Director-General enumerated three pieces of evidence which established the complainant "had committed fraud" though referred to additional evidence as well.

3. The first of the three enumerated pieces of evidence was identified as "[the complainant's] admission that [he] intentionally manipulated the list of beneficiaries by including duplicates". The fact that someone admits to having "intentionally manipulated" figures or data carries with it the clear concession by that person that the figures or data were altered, by means of "manipulation", for an ulterior, improper or sinister purpose and not simply that they were altered. In the context of a case in which fraud was alleged, such an admission of intentional manipulation would indeed support a conclusion that fraud was committed. This is not simply an inconsequential question of semantics.

4. The context in which any such admission would have been made was an interview of the complainant by the Office of Inspections and Investigations (OIGI) on 19 March 2016. While OIGI did find fraud, in its report it described neutrally, even benignly, what was said by the complainant in the interview as “modify[ing] beneficiary data”, “creat[ing] the duplicate beneficiaries” or “inserting duplicate beneficiaries”. Certainly, no finding was made by OIGI that the complainant admitted having “intentionally manipulated” figures or data. Nor did OIGI suggest that, in the record of interview, the complainant used language which could be viewed as conceding intentional manipulation. The Organization has not established that he did so in its decision to summarily dismiss him, in the impugned decision or in its pleas before the Tribunal.

5. The Director-General made, as one centerpiece of his rejection of the conclusion of the Appeals Committee, the admission of “intentional manipulation”. He was entitled to take a different view to that of the Appeals Committee but had to motivate that different conclusion with cogent reasons (see Judgments 4832, considerations 31 to 33, 4697, consideration 5, and 4504, consideration 10). As is apparent from the preceding discussion, the reasons given were not cogent.

6. It would be open to the Tribunal to remit the matter to the FAO to enable the Director-General to determine whether the appeal should be dismissed or allowed and motivate that decision. If this course was followed then it would be appropriate for the Director-General to consider the various flaws, both procedural and substantive, alleged by the complainant in the consideration and determination of the charges against him and also to consider again the conclusions of the Appeals Committee. Moreover, the findings of the Appeals Committee cast real doubt on the original September 2018 decision to summarily dismiss the complainant for fraud and gross negligence. However, rather than perpetuating further consideration of the charges against the complainant by remitting the matter and given that the facts of the case date back a decade, it is appropriate for the Tribunal to bring the proceedings to finality and determine now what is the appropriate relief.

7. The flaw in the decision making discussed in consideration 5 would warrant the setting aside of the impugned decision. However, it is necessary to determine whether this relief is appropriate in all the circumstances. Article VIII of the Tribunal's Statute provides that if a complaint is well-founded then the impugned decision can be rescinded though, if this is not possible or advisable, compensation can be awarded for the injury caused to her or him.

8. The Tribunal notes that the Appeals Committee concluded that the complainant had been negligent. A significant element in the complainant's pleas is a defence of the conclusions of the Committee and, in those pleas, the complainant speaks of the contributory negligence of others. Though the complainant does not do so explicitly, clearly implicit in the approach he adopts in his pleas, is an acknowledgment that he was negligent. And while he seeks reinstatement, he allows for the possibility in the orders he seeks that reinstatement might not be feasible. The Tribunal has repeatedly said that it may refuse to make such an order if reinstatement is no longer possible or if it is inappropriate. According to the Tribunal's case law, reinstatement is inadvisable when an employer has valid reasons for losing confidence in an employee (see, in particular, Judgments 4579, consideration 7, 4310, consideration 13, and 3364, consideration 27). There is little room to doubt this is so in relation to the complainant. In these circumstances the complainant is entitled to damages for the lost opportunity of continuing in employment with the FAO though with the caveat that he may ultimately have been found to have participated in fraud as had been determined by OIGI. Those damages are assessed in the sum of 20,000 United States dollars.

9. The question which now arises is what compensation should be awarded to the complainant for the injury occasioned by his unlawful dismissal. The Tribunal is satisfied he suffered moral injury as a result of his dismissal which should sound in moral damages, which the Tribunal assesses in the sum of 20,000 United States dollars.

10. The complainant seeks moral damages for the delays in the investigation of the allegations against him and the consequential time it took to prosecute and determine to finality (including the internal appeal) the charges against him. The Tribunal accepts that the time was excessive without descending into detail. However, the contention the complainant suffered moral injury founding a claim to moral damages under this head is expressed only in the most general terms including that the “delay in the internal justice process has had a crushing impact on the complainant’s personal, professional, psychological and family well-being” and that “his life came crashing down as he found his reputation in tatters and was blacklisted by the international humanitarian sector”. One example is given of the complainant securing employment with an international charity but being required to resign prematurely as a result of pressure by an official of the FAO. But, even if true, that has no bearing on the effect of delay. Under the Tribunal’s case law, the amount of compensation for unreasonable delay is ordinarily influenced by two considerations, one being the length of the delay and the other the effect of the delay on the employee concerned (see, for example, Judgments 4655, consideration 21, 4635, consideration 8, and 3160, consideration 17). The Tribunal has regularly stated that, in terms of damages, a complainant seeking compensation must provide clear evidence of the alleged unlawful act, of the injury suffered and of the causal link between the unlawful act and the injury, and that she or he bears the burden of proof in this regard (see Judgments 4891, consideration 17, 4556, consideration 12, 4158, consideration 4, 4157, consideration 7, and 4156, consideration 5). The complainant has not demonstrated he suffered moral injury because of delay. No moral damages should be awarded in this regard.

11. As the complainant has substantially succeeded, he is entitled to costs assessed in the sum of 3,000 United States dollars.

DECISION

For the above reasons,

1. The FAO shall pay the complainant 20,000 United States dollars in material damages.
2. The FAO shall pay the complainant 20,000 United States dollars in moral damages.
3. The FAO shall pay the complainant 3,000 United States dollars in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 25 October 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 6 February 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER