Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S. S.

v.

FAO

139th Session **Judgment No. 4944**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms E. S. S. against the Food and Agriculture Organization of the United Nations (FAO) on 2 November 2021 and corrected on 8 December 2021, the FAO's reply of 11 April 2022, the complainant's rejoinder of 8 July 2022 and the FAO's surrejoinder of 5 October 2022;

Considering the information provided at the Tribunal's request by the FAO on 18 June 2024 and by the complainant on 17 and 19 June 2024;

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 contests the decision rejecting her internal appeal in which she contended, among other things, that the investigations conducted and mandated by the World Food Programme (WFP) – an autonomous joint subsidiary programme of the United Nations and the FAO – into her complaint of rape were *ultra vires* and that her complaint should instead have been referred to and investigated by national or international judicial authorities.

The complainant is a former staff member of the WFP in Ethiopia. The complainant joined the WFP in September 2012 and separated from service on 20 December 2014. At the time of her separation from service, she was holding grade P-3.

On 8 October 2014, the complainant reported to the Ombudsman that a P-4 WFP staff member working in Ethiopia had raped her on the night of 4 September 2014, during a WFP retreat. On 10 October, the WFP Office of Inspections and Investigations (OIGI) initiated an investigation into the allegations.

On 12 November 2014, the WFP Investigations Officer sent an internal memorandum to the Director, OIGI, describing the findings of the investigation conducted by OIGI into the allegations raised by the complainant. The memorandum included the following conclusions and recommendation:

> "OIGI is of the opinion that prima facie [...] elements of the criminal offense of rape as described in [...] the Criminal Code of Ethiopia [...] are not met. However the legal evaluation can only be conclusively conducted by the national judicial authorities. [...] OIGI is of the opinion that prima facie [...] elements of the criminal offense of rape as described in [...] the Criminal Code of Brazil [...] (national law of the alleged perpetrator) are not met. [...] However this evaluation can only be conclusively conducted by the national judicial authorities [...] In light of all of the above, OIGI did not find sufficient evidence to conclude that [the alleged perpetrator]: i) Used force or attempted to use force to coerce the complainant [...] to have sexual activity with him; or ii) Engaged in non-consensual sexual activities with the complainant [...] As the Lead Investigator for this case and based on the findings and conclusions above, I propose to close the case as unfounded."

By email of 17 November, the Director, OIGI, informed the complainant that "[a]fter careful, objective consideration and analysis of information and records gathered during the interviews and from other sources, or lack thereof, [OIGI] did not find evidence that the sex was non-consensual" and that OIGI had concluded that the allegation of rape was unfounded. The Director, OIGI, further stated in his email that "in line with WFP's investigation's manual, OIGI does not issue investigation reports when allegations are not substantiated".

On 18 December 2014, the complainant sent an email to the WFP Inspector General in which she expressed her concerns with the way the investigation had been conducted. She concluded her email by stating: "I [...] trust that you will do the right thing by opening a complete investigation that would not allow any room for discredit to the final outcome".

On 19 January 2015, the complainant wrote to the WFP Executive Director, requesting him to review the 17 November 2014 decision and asking that a "thorough investigation that takes into account not only the evidence for rape but also sexual harassment, state of a victim's mind, WFP's policy on dealing with these cases and on the role of different WFP staff members in these situations" be carried out. On 28 January, she added that she was also requesting a "complete copy of the investigation report which served as the basis for the decision".

On 14 March 2015, the complainant wrote to the United States Embassy in Ethiopia, reporting that she was sexually assaulted by a WFP colleague on 4 September 2014 and asking for the Embassy's assistance in filing a police report.

On 18 March, the WFP Executive Director sent to the complainant "a copy of all of the investigation material" and invited her to comment on it. The complainant provided her comments on 3 May 2015.

On 31 August 2015, the complainant lodged an appeal with the Appeals Committee, directed against what she considered to be an implied decision by the WFP not to grant her request to undertake another investigation (internal appeal No. 746).

By letter of 4 September 2015, the WFP Executive Director informed the complainant that in order to address the concerns that she had raised, the investigation into her complaint would be reopened. The same Executive Director indicated in his letter that "[i]n view of the fact that the investigation will be reopened, any issue of potential compensation to [the complainant] [was] considered to be premature at this stage and will be deferred pending the conclusion of [...] further investigation". Two external investigators were appointed to conduct the reopened investigation.

On 8 March 2016, the WFP Inspector General shared with the complainant the draft investigation report prepared by the external investigators. On 21 May 2016, the complainant presented her comments about the draft investigation report.

On 13 June 2016, the complainant was provided with a copy of the final investigation report. According to the report, the external investigators found that they "[could not] conclude beyond a reasonable doubt that the sexual acts between [the complainant] and [the subject of the allegations] were not consensual" and "[could not] conclude beyond a reasonable doubt that [the subject of the allegations] sexually harassed [the complainant] after the incident".

By email of 23 December 2016, the WFP General Counsel informed the complainant that "[OIGI] ha[d] notified [her] of the outcome of the new investigation sharing the final report with [her]" and that "[t]he new investigation found that [her] complaint was not substantiated by sufficient evidence". The email further stated that "[a]n additional decision by management is required only if the investigation finds that the allegations were substantiated or if there were any other findings requiring action".

On 21 February 2017, the complainant's counsel, filed, on behalf of the complainant, a request for review "of an implied final administrative decision communicated to [the complainant] by email of WFP Legal Counsel [...] dated 23 December 2016 [...] not [to] be taking a further decision on the investigation report of [the external investigators]". The complainant's counsel requested the WFP Executive Director to "review the fact that investigations into criminal allegations should never have been authorized or undertaken by WFP investigators" and to find that "1) the investigations conducted by OIGI and [the external investigators], on behalf of WFP, were ultra vires; (2) that WFP is obligated to act within its prescribed mandate and inform staff of the limits of its administrative investigative powers; and (3) that WFP must clarify its rules and procedures governing its response to allegations of crimes, including sexual assault". The complainant's counsel further stated that "[b]oth investigations into [the complainant]'s allegations were riddled with bias, leading questions, invasions of her privacy, and

reflect deep ignorance regarding widely-accepted investigative practices in sexual assault cases. These serious problems did not simply occur by chance, but were direct results of WFP taking on criminal investigations even though WFP policy only foresees purely administrative fact-finding investigations."

On 11 September 2017, the complainant withdrew her internal appeal No. 746.

Following suspension by mutual agreement, on 2 May 2019, the WFP Executive Director responded to the complainant's 21 February 2017 request for review. In his reply, the same Executive Director stated that he did not find that the investigations conducted by OIGI and the external investigators were *ultra vires* and that "the fact that WFP's investigation outcomes are administrative [in] nature is a standard part of the information that is disclosed to participants in the investigation process" and explained, among others, that the WFP had improved its sexual harassment policy and that efforts to improve the WFP's response to allegations of sexual harassment were still ongoing. He nevertheless observed that "[t]he fact that it was necessary to repeat the investigation into [the complainant's] allegations itself demonstrates that [the standards of prompt and thorough investigation, treating the parties with respect and dignity] were not fully upheld in the first investigation".

On 1 July 2019, the complainant lodged an appeal with the Appeals Committee, directed against the 2 May 2019 decision, in which she requested, among other things, that it be found that the investigations into her complaint were *ultra vires* and that the WFP's rules be amended so that crimes of a sexual nature alleged against staff members of the WFP are dealt with by national or international judicial authorities.

In its report signed on 18 February 2021, the Appeals Committee recommended to reject the complainant's appeal as unfounded. The Appeals Committee concluded that the WFP "ha[d] a duty to investigate allegations of misconduct involving any of its personnel" and "acted legitimately in launching an internal investigation" into the complainant's complaint. Specifically, it found that "whilst the term 'rape' is not explicitly present in [the WFP's harassment policy in force at the time

of the alleged incident], it had to be concluded that the term 'sexual assault' included rape". The Appeals Committee also found that "even in cases where allegations are sent to local judicial authorities for investigation, nothing would preclude [the WFP] from reviewing the case internally and taking its own administrative or disciplinary action" and recommended that "crimes of a sexual nature such as rape can be referred to national or international authorities on a case-by-case basis and not automatically". The Appeals Committee further noted that the investigation report prepared by the external investigators was "well balanced and objective", that the external investigators had experience "in dealing with rape cases" and that the complainant had not provided convincing evidence that the choice of the external investigators had caused her any prejudice. However, the Appeals Committee considered that the WFP "did not fully discharge its duty of care" towards the complainant and, on that basis, recommended that the complainant be offered "such other relief [...] consider[ed] appropriate in light of the finding of the partial lack of duty of care".

By letter of 3 August 2021, the Director General of the FAO notified the complainant that he had decided to reject her appeal as unfounded. He however decided to award her 35,000 United States dollars in moral damages due to the findings in the WFP Executive Director's 2 May 2019 letter that the WFP had not fully adhered to its duty towards her in the initial response to her complaint, including its duty to investigate her complaint promptly and thoroughly, and that she had a right to be treated with greater respect, sensitivity, and professionalism. The Director General also decided to grant the complainant reimbursement of her legal fees. The Director General accepted the recommendation of the Appeals Committee that crimes of a sexual nature such as rape "be referred to national or international authorities on a case-by-case basis and not automatically" and noted that the second investigation was launched at the complainant's request. He also stated that he shared the finding of the Appeals Committee that the investigation report prepared by the external investigators was "well balanced and objective". That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to find that the investigation conducted by the WFP OIGI and the one conducted by the external investigators were *ultra vires*, "resulting in the wrongful tainting and diminishment of her rape allegations and the ultimate non-punishment of her alleged rapist, causing [her] great moral injury and suffering". She further asks the Tribunal to find that crimes of a sexual nature, such as rape, alleged against staff members of the WFP should be dealt with only by national or international judicial authorities, and to order that the WFP amend its internal rules in that respect. She claims moral damages in the amount of 60,000 Swiss francs for what she considers to be a delay in the internal appeal process. Finally, she asks for the reimbursement of her legal fees as well as "[s]uch other relief as the Tribunal determines to be just, necessary and fair".

The FAO asks the Tribunal to dismiss the complaint in its entirety and submits that some aspects of the complaint are irreceivable.

CONSIDERATIONS

1. The following discussion proceeds against the background already set out in the facts described above.

2. The complainant requests oral proceedings. The parties have presented ample written submissions and documents to permit the Tribunal to reach an informed and just decision on the case. Therefore, the request is rejected.

3. The complainant advances her pleas under three headings in the following order:

(i) the internal appeal was excessively delayed;

(ii) the investigations into her complaint of rape were *ultra vires* and based on mistakes of fact; and

(iii) the Organization violated its duty of care towards the complainant.

4. In her first plea, the complainant alleges that the internal appeal process was unreasonably lengthy, as it took 16 months for the Appeals Committee to review her case plus an additional nine months for the Director General to take the final decision. She requests moral compensation for this delay, in the amount of 60,000 Swiss francs.

The Tribunal's consistent case law holds that the amount of compensation for unreasonable delay in internal proceedings will ordinarily be influenced by at least two considerations. One is the length of the delay and the other is the effect of the delay. These considerations are interrelated, as a lengthy delay may have a greater effect. That latter consideration, the effect of the delay, will usually depend on, amongst other things, the subject matter of the appeal (see Judgments 4804, consideration 5, 4563, consideration 14, 4487, consideration 14, and 3160, considerations 16 and 17). The Tribunal held that an unreasonable delay in an internal appeal by itself is not sufficient to award moral damages. It is also required that the complainant articulate the adverse effects which the delay has caused (see Judgments 4396, consideration 12, 4392, consideration 12, 4231, consideration 15, and 4147, consideration 13). In the present case, the internal appeal was lengthy. In assessing whether the length was unreasonable, it is necessary to have regard to the complexity of the case and to the fact that the appeal process was carried out during the COVID-19 pandemic period. Indeed, the appeal was lodged on 1 July 2019, the Appeals Committee reviewed the case on 4 November 2020 and issued its recommendations on 18 February 2021, and the Director General adopted the final decision on 3 August 2021. But ultimately it is not necessary to evaluate whether the internal appeal was unreasonably lengthy as the complainant has not established that she was adversely affected by the delay. As a result, this plea is unfounded and the claim for monetary compensation for moral injury is rejected.

5. The complainant's second plea is twofold. On the one hand, she contends that the investigations conducted and mandated by the WFP were *ultra vires* and that the Organization should have referred the matter to the national authority competent for criminal investigation. More specifically, she alleges that:

– the WFP Office of Inspections and Investigations (OIGI) did not have the authority to investigate a complaint of sexual assault/rape;
– no rule allowed the WFP to conduct an investigation into criminal matters related to a staff member's intimate life;
– no rule allowed the WFP to hire an external firm to conduct an investigation into the crime of rape; and
– the WFP's duty was not to investigate the matter but to refer it to the national authorities, and to wait for the conclusion of the criminal investigation to issue a disciplinary measure against the alleged perpetrator.

On the other hand, the complainant contends that the investigation and the impugned decision are flawed because they are based on errors of facts and law. Specifically, she alleges that:

– the WFP, in the memorandum of 12 November 2014, arbitrarily relied upon the definition of rape as provided for in the Ethiopian and Brazilian Criminal Codes;
– deficiencies affected the first and second investigation proceedings;
– the second investigation inflicted extreme emotional distress on the complainant and was conducted by investigators who did not have expertise in investigating crimes;
– the second investigation appeared to aim solely at finding exculpatory evidence in favour of the alleged perpetrator and inculpatory evidence against the complainant;
– the investigation ignored essential facts of the case, including that the complainant simultaneously told several persons about the incident; it also ignored the various definitions of rape in other countries and how victims of sexual assault tend to behave;
– there were no reasons to doubt the credibility of the complainant; and
– in any event, the subject of the allegations should at least have been disciplined for having engaged in consensual sex with a subordinate "if one were to admit for the sake of the argument alone that the sexual intercourse was consensual".

6. The complainant's contention that the investigations conducted and mandated by the Organization were *ultra vires* and went beyond the scope of an administrative investigation, is misconceived.

Firstly, the Tribunal notes that the FAO's legal framework enshrined a wide definition of sexual harassment, which included rape, and compelled the Organization to promptly and thoroughly investigate reports of sexual assault. Namely, paragraph 15 of the WFP's Policy on Harassment, Sexual Harassment and Abuse of Authority, Circular No. EDD 2011/009, which was in force at the time of the alleged incident, stated:

> "Sexual harassment includes any unwelcome sexual advance or unwanted verbal or physical conduct of a sexual nature."

The said circular also added that:

> "Physical harassment could be: Sexual or other assault."

Paragraph 10(viii) of the WFP's Circular No. OED 2018/007 "Protection from harassment, sexual harassment, abuse of authority, and discrimination" read:

> "10. (viii) 'Sexual harassment' is any unwelcome sexual advance, verbal or physical conduct of a sexual nature, be it an act of sexual violence or any other behaviour of a sexual nature, that might reasonably cause offense or humiliation to another person".

A footnote to the text added:

> "The expression 'sexual violence' refers to any acts of a sexual nature against one or more persons or that cause such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent."

Secondly, the Tribunal notes that pursuant to the relevant provisions of the FAO Staff Rules and Regulations, the fact that deeds of staff members amount to a violation of national laws including crimes as defined by competent national laws, does not impede the FAO from taking action and investigating such deeds as misconduct for the purposes of its internal legal framework. Misconduct may well be relevant and be punishable both by national law and by the legal

framework of an international organization. Namely, Section 330.1.52 of the FAO Staff Rules and Regulations stated:

> "[...] the following are specific examples of unsatisfactory conduct: [...] (e) Serious violation of any applicable national law. [...]"

Paragraph 44 of the Standards of Conduct for the International Civil Service, quoted in Section 304 of the FAO Staff Rules and Regulations, read:

> "Violations of the law can range from serious criminal activities to trivial offences, and organizations may be called upon to exercise judgement depending on the nature and circumstances of individual cases. A conviction by a national court will usually, although not always, be persuasive evidence of the act for which an international civil servant was prosecuted; acts that are generally recognized as offences by national criminal laws will normally also be considered violations of the standards of conduct for the international civil service."

Paragraph 16 of the Charter of the WFP's Office of the Inspector General (OIG) stated:

> "OIG is responsible for assessing and investigating allegations of misconduct, such as fraud, corruption, collusion, theft/misappropriation, sexual exploitation and abuse, workplace harassment, sexual harassment, abuse of authority, retaliation and other wrongdoing by WFP personnel."

When misconduct amounts to a crime, the option for the FAO/WFP to refer the matter to the relevant national authorities falls within the discretion of the Organization. Paragraph 41 of the FAO Guidelines for Internal Administrative Investigations by the OIG stated:

> "Where a breach of national laws is believed to have occurred, OIG makes recommendations to the Legal Counsel for an assessment of whether the matter should be forwarded to the relevant national authorities."

Paragraphs 57, 61 and 69 of Circular No. OED 2018/007 provided:

> "57. Formal reports must be submitted to the [OIG] [...]
>
> [...]
>
> 61. [OIG] has the authority to open an investigation into allegations of abusive conduct at its own initiative [...] Investigators of abusive conduct shall have specialized training in such investigations.
>
> [...]

> 69. In addition to the above procedures, an alleged perpetrator may be referred to national authorities where the conduct may constitute a criminal act. A decision to refer is based on a case-by-case assessment, in consultation with the Legal Office and taking into account the specific circumstances of the case, such as the views of the affected person and the potential consequences of referral on that person."

In light of the above-quoted rules, the Organization is entitled to carry out an investigation into episodes of sexual harassment, including involving violence or lack of consent, even though such episodes may amount to rape according to the relevant national criminal laws. As a matter of fact, the same deed (here the alleged rape) may be regarded simultaneously as a crime according to the relevant national laws and as misconduct according to the legal framework of an international organization. Accordingly, such a deed may well be the subject matter of a criminal investigation and of internal proceedings (through an investigation into a harassment complaint and potential disciplinary proceedings) in parallel or in sequence, as can be inferred from paragraph 44 of the Standards of Conduct for the International Civil Service, quoted in Section 304 of the FAO Staff Rules and Regulations. The fact that a deed may amount to a crime potentially subject to criminal investigation to be carried out by the competent national authority does not impede an international organization from taking action for the purposes of its internal rules, and, in particular, for the purpose of conducting a prompt and thorough investigation upon a report of harassment/misconduct. There are no internal rules or policies that prevent the FAO from investigating misconduct amounting to a crime, for the purposes and the effects of internal investigations and measures. In such a case, the investigation is not of a criminal nature, and it is carried out without prejudice for further – concurrent, earlier or subsequent – action taken by the competent national authority. Thus, the allegation that, in the present case, the investigations mandated and conducted by the WFP were *ultra vires* and beyond the Organization's mandate, is unfounded.

As to the complainant's contention that the FAO was not allowed to hire an external investigator for investigating into a crime, the Tribunal reiterates that the investigation was administrative in

character, and that nothing in the rules prevented the FAO from engaging external investigators. In the circumstances of the case, the hiring of external investigators was reasonable and appropriate, in light of the complexity and of the sensitivity of the case.

7. The complainant further contends that, in the present case, rather than investigating the case, the FAO should have referred it to national or international judicial authorities. This argument is unfounded. As noted above, the applicable legal framework does not compel the FAO to report to the police and national judicial authority facts that allegedly amount to crimes punishable on the basis of the local applicable criminal law. The applicable rules and policies establish that the FAO has the discretionary power to report a breach of national laws to the relevant national authorities on a case-by-case basis. An assessment on a case-by-case basis required, for example, an evaluation, by the Organization, of whether national proceedings might help to ensure a prompt investigation, useful for the purposes of the internal proceedings set up for the protection of the victim and the punishment of the perpetrator. The complainant has not established to the Tribunal's satisfaction that, in the present case, this discretionary power was exercised unlawfully. She was, in any event, able to report directly to the local police and judicial authority, if she had wanted to.

8. As to the arguments alleging errors of fact or law in the investigation, firstly, the Tribunal observes that it will not address the arguments concerning the first investigation as they are outside the scope of the present case. The first investigation was replaced by the second one, and the complainant withdrew her internal appeal against the outcome of the first investigation. Thus, there is no final decision based on the outcome of the first investigation, open to challenge before the Tribunal (Article VII, paragraph 1, of the Tribunal's Statute).

Secondly, the Tribunal finds it appropriate to establish the scope and the purpose of the complainant's complaint, also in light of her initial report of rape, of her request to reopen the investigation, and of her internal appeal. Having regard to the arguments and the claims contained in her internal appeal and in the present complaint, the

Tribunal is satisfied that the scope and the purpose of the action taken by the complainant is the punishment of the alleged perpetrator. Indeed, in her internal appeal, she never requested measures aimed at her protection in the workplace nor moral compensation for the alleged rape. She insisted on the punishment of the alleged perpetrator and on his referral to the local authority for criminal investigation. Even in the present complaint, she does not claim moral damages for the rape, but only for the delay in the internal appeal, and she insists on the punishment of the alleged perpetrator. In this respect, the Tribunal recalls that disciplinary relations between an organization and a staff member do not directly concern other members of staff or affect their position in law. Consequently, a decision regarding a disciplinary inquiry or a disciplinary measure relating to one staff member ordinarily will not adversely affect other staff. Thus, a staff member ordinarily has no cause of action to challenge a disciplinary sanction or a refusal to impose one on another staff member (see Judgment 4512, consideration 6, and the case law quoted therein). This is the position in this case. In this respect, the complainant's arguments are irreceivable for lack of cause of action.

9. In her third plea, the complainant alleges a breach of the Organization's duty of care based upon two arguments. Firstly, she contends that the Organization failed to provide her with support and procedural guidance. Secondly, she also argues that the Organization's refusal to amend the applicable rules in order to render the submission of allegations of rape to national authorities mandatory amounts to a violation of its duty of care, including regarding current employees and future victims.

The Tribunal notes that the Organization has already acknowledged in the impugned decision a breach of its duty of care during the first investigation and awarded the complainant compensation in the sum of 35,000 United States dollars in this respect. The complainant has not provided evidence that a higher compensation would be justified, thus, the plea is unfounded.

By her second argument, the complainant, in essence, requests the Tribunal to order the Organization to modify its current policy, to the extent that, in cases of misconduct amounting to a crime, referring them to the national authorities, rather than directly investigating them, should be mandatory. This claim is irreceivable. The Tribunal does not have the authority to issue recommendations about an organisation's policies (see Judgments 4551, consideration 15, 3345, consideration 11, 3225, consideration 6, 2793, consideration 21, and 2061, consideration 5).

10. The complainant's claim to be awarded such other relief as the Tribunal deems just, necessary, and fair is too vague to be receivable (see, for example, Judgments 4719, consideration 7, and 4602, consideration 8).

11. As the complaint fails, the complainant is not entitled to costs of the present proceedings.

12. In light of the foregoing, the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 29 October 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Mr Clément Gascon, 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

CLÉMENT GASCON

ROSANNA DE NICTOLIS

MIRKA DREGER