

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Y.
v.
FAO

139th Session

Judgment No. 4945

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr T. Y. against the Food and Agriculture Organization of the United Nations (FAO) on 11 August 2022 and corrected on 2 September 2022, the FAO's reply of 20 January 2023, the complainant's rejoinder of 22 February 2023, corrected on 27 February, and the FAO's surrejoinder of 24 May 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 challenges the FAO's decision to confirm the allegations of sexual harassment against him, to impose on him a ban from all future employment with the FAO/World Food Programme (WFP), to include his name in the United Nations Clear Check screening database for perpetrators of sexual harassment, not to renew his short-term contract following a mandatory break in service, and to place a note in his personnel file confirming the above.

The complainant joined the WFP – an autonomous joint subsidiary programme of the United Nations and the FAO – at the Ethiopia Country Office in November 2006. Following a series of different types of contracts, in April 2017, he was hired under a short-term contract as

Head of Field Office, Rumbek, in the South Sudan Country Office. In May 2018, following a mandatory break in service, he was rehired under a short-term contract to continue serving as Head of Field Office, Rumbek. This short-term contract was subsequently extended to 19 April 2019, at which point the complainant reached the 11-month maximum period of continuous service under that contract (11 months being the maximum limit of continuous service under short-term contracts).

Prior to that, on 12 September 2018, the Office of the Inspector General (OIGI) received a complaint of sexual harassment and sexual assault by Ms B., a Consultant for the FAO at the time. In her complaint, Ms B. reported events that had allegedly taken place on the evening of 18 August 2018, initially during a wedding celebration at a hotel, and then at the WFP Rumbek compound. Ms B. alleged that the complainant had engaged in the following acts:

- i. whilst at a party on a compound near the WFP base, he had attempted to forcibly kiss her without her consent;
- ii. whilst walking to the WFP compound, he had groped her buttocks without her consent;
- iii. whilst at her residence, he had entered her room and had assaulted her.

According to Ms B., the motivation of the complainant's acts was believed to have been sexual.

By a letter of 21 September 2018, the complainant was informed that he was under investigation for alleged sexual harassment and that, pending the investigation, he was being suspended from duty with pay, in accordance with FAO/WFP Staff Rule 303.0.3 and the WFP Human Resources Manual Section VIII.1.3.

In its report, issued on 7 February 2019, OIGI concluded that there was sufficient evidence to support that the complainant had engaged in sexual harassment against Ms B. and that, by so doing, he had breached the WFP rules and the conditions of his contract. OIGI recommended that appropriate disciplinary and/or administrative action be taken against the complainant.

On 17 April 2019, two days before the complainant's short-term contract came to an end, the Chief of Staff Relations wrote to the complainant to inform him that his suspension pending investigation and the related formal process were without prejudice to, and did not interfere with, the regular administration of his employment contract. The Chief of Staff Relations added that the Administration would be communicating with him in due course on the next steps of the formal process, possibly during his break in service. Soon after, on 26 April 2019, the position of Head of Field Office, Rumbek, which the complainant had held until the end of his short-term contract on 19 April 2019, was filled through reassignment. On 10 July 2019, the complainant wrote an email to the Chief of Staff Relations in which he recalled that his three-month mandatory break in service was coming to an end on 19 July 2019 and asked that the WFP "reinitiate [his] contract". The complainant repeated this request several times thereafter, but he received no response.

By a memorandum of 19 December 2019, the Director of the Human Resources Department (HRD) communicated to the complainant the findings of the investigation and informed him that there was *prima facie* evidence that he had sexually harassed Ms B. through two unwelcome physical sexual advances at a hotel and an assault at the Rumbek compound. The Director of HRD also informed the complainant that the evidence was sufficiently serious to warrant the initiation of disciplinary proceedings against him had he still been a WFP employee. The Director of HRD invited the complainant to provide a written response within ten days, further to which the WFP would make a final decision regarding the appropriate action to be taken. Having obtained an extension of time, the complainant provided his response on 20 January 2020 denying all charges.

By a memorandum dated 1 June 2020, communicated to the complainant on 2 June 2020, the Director of HRD informed the complainant that it had been established beyond a reasonable doubt that he had committed serious misconduct by engaging in sexual harassment against Ms B. and, in so doing, he had caused grave reputational harm to the WFP. The Director of HRD advised the complainant that his

conduct had irrevocably breached the bond of trust necessary for an employment relationship with the WFP and, had the complainant still been employed by the WFP, his conduct would have been sufficiently serious to warrant recommending the disciplinary measure of summary dismissal, pursuant to the WFP Human Resources Manual Section VIII.1.5.1(a)(v) and (f). The Director of HRD also advised the complainant that the Administration had decided to impose on him the administrative measure of a ban from future employment with the WFP on any contract type, in accordance with paragraph 66 of the Policy on “Protection from Harassment, Sexual Harassment, Abuse of Authority and Discrimination”, and that personal information identifying him would be included in the United Nations Clear Check screening database created to prevent the rehire of perpetrators of sexual harassment. The Director of HRD added that a note would be placed in the complainant’s personnel file indicating that a recommendation to confirm the allegations of misconduct would have been made had he remained in the service of the WFP and that the administrative measure of a ban from all future employment with the WFP had been imposed on him.

On 4 August 2020, the complainant filed an appeal to the WFP Executive Director requesting a review of the decision contained in the memorandum dated 1 June 2020. Following the rejection of this appeal on 3 October 2020, the complainant filed an appeal with the FAO Appeals Committee on 21 November 2020.

In its report, submitted to the FAO Director-General on 25 January 2022, the Appeals Committee considered the appeal to be fully receivable, i.e. also receivable insofar as it concerned the complainant’s challenge to the decision not to rehire him following the expiration of his short-term appointment on 19 April 2019. In this regard, the Committee noted that short-term appointments were regulated by breaks in service of different durations before a staff member could be rehired, and that the reference to “break in service” implied the possibility that service would be resumed, unless the staff member was expressly informed that it would not.

Having regard to the widespread practice of rehiring short-term staff members and consultants almost immediately after breaks in service, the Committee considered it was the WFP's responsibility to promptly inform its employees in this regard. While acknowledging that several times before the expiry of his three-month break in service, the complainant had sought to obtain information from the Administration on whether the WFP would rehire him, the Committee was not convinced that an administrative decision on this request had been duly communicated to him. It thus concluded that the WFP had never clearly addressed the complainant's requests for clarification, or plainly communicated to him the decision not to rehire him, in response to his emails.

As regards the finding that the complainant had sexually harassed Ms B., the Committee considered that both the complainant and Ms B. had committed serious misconduct in the evening of 18 August 2018, since the behaviour of both fell far short of the standard required by international civil servants – in fact, the Committee was stunned to find out that officials from both the WFP and the FAO were indulging in partying, including what appeared to be an excessive consumption of alcoholic beverages, while on duty in a developing country. Nonetheless, the Committee was not convinced beyond a reasonable doubt by the investigation carried out by the WFP and considered it had several loopholes and inconsistencies. This, in the Committee's view, put in question the proportionality of the harsh decision by the WFP to include the name of the complainant in the United Nations Clear Check screening database, thus completely preventing him from being recruited in the future by any organisation or programme in the United Nations system. The Committee recommended that the appeal be dismissed but that the WFP remove the name of the complainant from the United Nations Clear Check screening database.

In his final decision, communicated to the complainant by a letter dated 14 June 2021, the FAO Director-General did not agree with the Appeals Committee's conclusion that the appeal was fully receivable, thus maintaining his position that the complainant's challenge to the decision not to rehire him following the expiry of his short-term

contract and all related requests, namely the complainant's request for reinstatement and compensation for loss of earnings, were time-barred. On the merits, the Director-General concurred with the Appeals Committee's recommendation to dismiss the complainant's appeal but did not accept its recommendation to remove his name from the United Nations Clear Check screening database. This is the impugned decision.

The complainant asks the Tribunal to order the FAO/WFP to withdraw the false accusation of sexual harassment, to clear his name and to pronounce him innocent, and to remove his name from the United Nations Clear Check screening database, as the inclusion of his name in that database bars him from any future employment with the United Nations. He also asks that he be reinstated in his job and that he be awarded 351,146.40 United States dollars in material damages, which corresponds to what he would have earned from 20 April 2019 to the date of filing this complaint had it not been for the unfair and unilateral termination of his contract, and 500,000 United States dollars in moral damages for the mental agony he suffered due to the false accusation. He requests that the FAO/WFP and his accuser, Ms B., be ordered to offer him a written apology for the immeasurable harm they have caused him through the false accusation and, as far as the FAO/WFP is concerned, also for the delay in rendering a fair decision.

The FAO/WFP asks the Tribunal to dismiss the complaint as irreceivable insofar as it concerns the complainant's challenge to the decision not to rehire him after his mandatory break in service, and unfounded in its entirety.

CONSIDERATIONS

1. The complainant had been a member of the staff of the World Food Programme (WFP). He commenced proceedings in this Tribunal by a complaint filed 11 August 2022. The general background is already set out earlier in this judgment and need not be repeated in detail. Suffice it to note, at this point, the complainant had been charged with engaging in sexual harassment of Ms B. on 18 August 2018 involving, allegedly, two physical sexual advances and a subsequent

assault. The charges were laid by a memorandum dated 19 December 2019. The laying of the charges had been preceded by a report by the Office of the Inspector General (OIGI) dated 7 February 2019. By a memorandum dated 1 June 2020, the complainant was informed that the evidence established beyond a reasonable doubt that he had committed serious misconduct by engaging in the sexual harassment of Ms B. and, in so doing, causing grave reputational harm to the WFP. The memorandum set out the Administration's analysis of the facts, the conclusions of fact reached and the outcome, namely the administrative measure banning the complainant from future employment with the WFP and the inclusion in his personnel file of a note regarding the same. The memorandum also included an intimation that the Administration would cause personal information identifying the complainant to be placed on the United Nations Clear Check screening database, said to have been created "to prevent the rehire of perpetrators of sexual harassment". The memorandum was communicated to the complainant on 2 June 2020.

2. The complainant appealed against this decision ("appeal to the WFP Executive Director") resulting in a letter of the Executive Director of 3 October 2020, informing the complainant that he would not "overturn the 2 June 2020 decision", but also rejecting as irreceivable any claim by him concerning a decision not to rehire him. This led to an appeal to the Appeals Committee resulting in a report dated 25 January 2022 recommending the appeal be rejected but that the WFP remove his name from the United Nations Clear Check screening database. The appeal was rejected by decision of the Director-General dated 14 June 2022. This is the decision impugned in these proceedings.

3. The grievances underlying the complaint can conveniently be considered separately, particularly given that the WFP argues that the complaint is irreceivable insofar as it concerns the grievance regarding the decision not to hire or rehire the complainant in the circumstances discussed shortly, that is, after his short-term appointment concluded. The other grievance concerns the decision to confirm the sexual harassment allegation against him with all resultant consequences, namely to ban

him from all future employment with the WFP, to place a note in his personnel file, and to include his name in the United Nations Clear Check screening database.

4. The issue of receivability arises in the following way. At the time the complainant last actually worked for the WFP, he had been on a short-term appointment expiring on 19 April 2019. Under the applicable provisions of the WFP Human Resources Manual, short-term appointments expired on the date specified in the terms of appointment without prior notice. Staff Rule 303.1.311 provided that an appeal regarding a grievance arising out of an administrative decision must have been made by a letter “despatched within 90 days from the date of receipt of the decision impugned”. The WFP argues that no appeal was lodged within the specified time which will ultimately result in the complainant not having exhausted internal means of redress, as provided for in Article VII of the Tribunal’s Statute. There are two streams to the argument on time limits advanced by the WFP. The first appears to be that the complainant had 90 days from 19 April 2019 within which to lodge an appeal. The second stream is to the effect that if the complainant could reasonably have been expected to secure a further short-term appointment after three months of “break in service”, but did not, then he had to submit an appeal within 90 days from 18 July 2019, that is by 16 October 2019. On either approach, so the WFP argues, the filing of any appeal concerning the hiring or rehiring of him would have been well out of time.

5. The complainant finds support in the conclusion of the Appeals Committee concerning the receivability of his grievance of what the Committee described as the “non rehiring” of the complainant after his three-month break in service. The Committee concluded the grievance concerning “non rehiring” was “fully receivable”, because the WFP never “plainly communicated to [the complainant] the decision not to rehire him in response to his emails”.

6. In some cases, the circumstances establish that an organisation has not acted in good faith and a staff member should not bear the consequences of any obscurity in its dealings with him including the consequences of the non-observance of time limits (see, for example, Judgment 3027, consideration 7). However, the complainant does not point to any communications with the WFP within any period of substance proximate to three or even six months of 4 August 2020 (when the complainant filed his appeal to the WFP Executive Director), which might have misled the complainant about his rehiring in the future or reasonably led him to believe, then or earlier, that it remained a possibility. Nor was there any earlier communication which could have been viewed as having an enduring effect. His appeal of 4 August 2020, insofar as it concerned the decision not to rehire him, was out of time and, accordingly, he did not exhaust internal means of redress. The complainant has, on this topic, failed to comply with Article VII of the Tribunal's Statute and his complaint to the Tribunal is irreceivable in part.

7. It is now necessary to consider the complainant's challenge to the finding that he had engaged in sexual harassment and the resultant consequences, namely to ban him from all future employment with the WFP, to place a note in his personnel file, and to include his name in the United Nations Clear Check screening database.

8. Again, the complainant seeks to find support in the report of the Appeals Committee. The approach of the Committee is a curious one. A material portion of its report is given over to chastising the complainant and Ms B. for consuming what the Committee believed (almost certainly correctly) was excessive amounts of alcohol on the evening of 18 August 2018 and their failure, as international civil servants, to act with propriety. But this, in the context of this matter, was not the critical issue. It did not address, with any precision and clarity whether it was satisfied that the complainant had sexually harassed Ms B. beyond saying two things. The first was that "something had indeed happened on the evening of 18 August 2018" and the second was that it was not "convinced beyond reasonable doubt by the investigation carried out by the [WFP]" referring to "loopholes and inconsistencies".

It did not explain what those loopholes and inconsistencies were nor, specifically, what it was that had not been established beyond reasonable doubt. Moreover, the proposition that “something had indeed happened” leaves entirely unresolved what the Committee believed did or may have happened.

9. The Tribunal’s assessment of the investigation that had been undertaken by OIGI is that it was thorough and balanced. Its report was cogent and persuasive. It is not for the Tribunal to itself determine whether the conduct the subject of the grievance has been established beyond reasonable doubt but rather whether there was evidence before the decision-maker which would justify such a decision by that decision-maker (see, for example, Judgment 3964, consideration 13). In this case there was. More generally, the Tribunal will accept findings of fact by investigative bodies, particularly when they have heard evidence from witnesses (as happened in this case) in the absence of manifest error (see, for example, Judgment 4237, consideration 12).

10. If it was open to the FAO/WFP to find the complainant guilty of the misconduct alleged, as it was, then what it decided to do in consequence involved the exercise of a discretionary power. It is not evident at all that the discretionary power miscarried when the FAO/WFP decided to ban the complainant from future employment and to place a note in his personnel file to this effect. Similarly, the discretionary power did not miscarry in relation to causing personal information identifying the complainant to be placed on the United Nations Clear Check screening database, which appears to have been created “to prevent the rehire of perpetrators of sexual harassment”. Many international organisations have a policy of zero tolerance for sexual harassment and it is a legitimate mechanism, even if harsh, to meet that objective by creating a database designed to reveal individuals who have clearly been found to have engaged in such conduct.

11. A matter raised by the complainant in his pleas is that the length of time the process of investigating, determining, and reviewing whether he had engaged in misconduct was excessive. It was a lengthy

process. However, whether it should be characterized as excessive is relevant only to the question, in this case, of whether the complainant is entitled to moral damages. In his pleas he singularly fails to prove he suffered moral injury and thus has failed to establish the foundation for moral damages (see Judgment 4422, consideration 19). Accordingly, whether the length of time was excessive, is irrelevant.

12. The complaint should 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