

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

B. G. (No. 2)

v.

FAO

111th Session

Judgment No. 3011

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr M. B. G. against the Food and Agriculture Organization of the United Nations (FAO) on 14 July 2009, the FAO's reply of 30 November 2009, the complainant's rejoinder of 25 January 2010 and the Organization's surrejoinder of 25 March 2010;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant is an Italian national born in 1944. He was recruited by the FAO in June 1968 at grade G-1. After being promoted a number of times he attained grade G-6 in April 1980. In January 1993 he was promoted to the Professional category post of Finance Officer, at grade P-3, where he remained until his agreed separation from the Organization on 13 October 2000. He was subsequently employed by the FAO as a Consultant from 1 September to 30 December 2006.

By a letter of 21 March 2007 the Human Resources Management Division (AFH) informed him that, when his terminal emoluments had been paid to him in 2000, the sum representing three months' salary in lieu of notice had been paid twice, resulting in an overpayment of 16,725 United States dollars which the Organization intended to recover. AFH expressed the view that, having worked as a Finance Officer for many years, he "could not [have] ignore[d] that there was a patent disproportion between [his] entitlement[s] under the terms of the agreed separation and the amounts which [he had] received" and that, consequently, Staff Rule 302.3.172, which provides that "[t]he right of the Organization to claim from a staff member any overpayment made and received in good faith shall lapse two years after such overpayment was made", did not apply. It proposed that the complainant reimburse the total amount of the overpayment or, alternatively, that the Administration withhold the final instalment of the honorarium for his consultancy work, amounting to 5,074.50 dollars, and that the remaining balance of 11,650.50 dollars be directly reimbursed by him.

The complainant replied by a letter of 7 April 2007, expressing resentment at the fact that the FAO had chosen to accuse him of acting in bad faith, rather than advising him of the error and awaiting a response. He explained that he had received numerous payments during the period of his separation, many of which were converted from one currency to another and for which no remittance advices were issued. As the overall amount was within the expected range, he had no reason to question whether these payments were correct. He requested that the Organization issue an official apology for the "grave insinuations" made in the letter of 21 March, that that letter be revoked and removed from his personnel file and that the balance of the honorarium owed to him for his consultancy work be released immediately. He stated that, once these requests had been granted, he would be prepared to look into the matter of the alleged overpayment and to take any appropriate action that might be necessary.

In a further letter to AFH, dated 15 April 2007, the complainant drew attention to the fact that in the letter of 9 October 2000, by which

the Organization had given him formal notice of the termination of his appointment, the list of terminal emoluments due to him was followed by the statement that “the above amounts are given as approximate since they are subject to computerisation and to any possible variation in the Post Adjustment classification and salary scale occurring prior to the effective date of your separation”. He also noted that a payroll estimate he had uncovered contained figures which were substantially at variance with those prepared by the Administration and Finance Department (AFP) and he requested that AFH verify once again whether an overpayment had been made.

In a letter of 19 June 2007 AFH assured the complainant that there had been no intention to offend him in advising him of the overpayment. It provided him with a detailed list of the payments made at the time of his separation, together with copies of the relevant payslips, and invited him to submit his proposals for repayment of the outstanding amount. It further informed him that all records of the correspondence on this issue would be removed from his personnel file once the matter was resolved. On 11 September 2007 the complainant lodged an appeal with the Director-General against the “decision of the Organization to accuse [him] of bad faith in not noticing an alleged overpayment made [...] upon [his] separation”, reiterating the requests made in his letter of 7 April. Following the rejection of this appeal, he referred the matter to the Appeals Committee on 5 February 2008, adding a claim for damages to the requests he had already made in his appeal to the Director-General.

The Appeals Committee issued its report on 14 November 2008. It found that the appeal was irreceivable insofar as the issue of the overpayment and its recovery was concerned, given that no administrative decision had been taken by the Organization on that particular issue. However, it found that the appeal was receivable insofar as it concerned the decision to withhold payment of the balance of the complainant’s honorarium for his consultancy work. It recommended that the FAO reiterate that no offence was intended in the letters addressed to the complainant on 21 March and 19 June 2007, that these letters and related documents be removed from his

personnel file and that the balance of the honorarium be paid without further delay. By a letter dated 15 May 2009, which is the impugned decision, the complainant was informed that the Director-General had decided not to accept the Appeals Committee's recommendations.

On 14 July 2009 the complainant sent the FAO a cheque for 16,725 dollars, i.e. an amount equal to that of the alleged overpayment, and on 15 September 2009 the balance of the honorarium for his consultancy work was paid by the Organization.

B. The complainant considers that by asserting in the letter of 21 March 2007 that he "could not [have] ignore[d] that there was a patent disproportion between [his] entitlements under the terms of the agreed separation and the amounts which [he had] received", and by deciding that Staff Rule 302.3.172 did not apply, the Organization *de facto* accused him of having acted in bad faith.

He strongly denies that accusation and reproaches the FAO for having made it, rather than attempting to contact him to clarify the matter. He contends that Staff Rule 302.3.172 is normally invoked in connection with fraudulent claims and that bad faith, according to its ordinary meaning, requires an intent to deceive which was entirely absent in his case. He explains that he received numerous payments at the time of his separation and, as the total amount received was within the expected range, he did not become aware of any overpayment. He emphasises in that respect that some of these payments involved currency conversions and that he was expressly advised that the figures given by the Organization were approximate. He adds that the defendant's accusation completely disregarded his fragile physical and mental state at the time of separation.

Referring to the two-year prescription period that applies, by virtue of Staff Rule 302.3.172, to claims by the Organization for the recovery of overpayments received in good faith, the complainant argues that the FAO ought to have provided proof that the overpayment was received in bad faith, yet it has thus far supplied no evidence to substantiate its allegation. The complainant also contends that the FAO's decision to withhold the balance of his honorarium for

his consultancy work is arbitrary and illegal, given that the dispute regarding the overpayment arises from a contract which is different from and in no way related to his consultancy contract. He maintains that, contrary to what is required by the case law, he was given no opportunity to respond to the accusation of bad faith and was denied the benefit of the presumption of innocence. He asserts that the Organization's handling of the overpayment issue has not only compromised his reputation and cast doubt on his integrity, but has also prevented him from accepting further consultancy contracts.

The complainant seeks an official apology from the FAO for the manner in which it handled the issue of the overpayment. He claims material and moral damages in an amount to be determined by the Tribunal, and costs.

C. In its reply the Organization submits that the complaint is irreceivable because the complainant no longer has a cause of action. Indeed, his reimbursement of the overpayment in July 2009 was perfectly valid under general principles of law and hence his claims regarding the FAO's request to recover the overpayment are moot and therefore irreceivable. Similarly, his claims regarding the balance of his honorarium are moot, given that the Organization paid that amount as soon as he had honoured his debt. In addition, as the complainant was never accused of having acted in bad faith, his claims in that respect are also irreceivable. Subsidiarily, the defendant submits that neither the letter of 21 March 2007 nor that of 19 June 2007 was intended as a final administrative decision and that, consequently, the complaint is irreceivable because it is not directed against a final decision.

On the merits, the FAO contends that it was lawful and reasonable for it to request reimbursement of the overpayment made to the complainant in error, and that in accordance with a general principle of law recognised in the Tribunal's case law, it was entitled to offset the amount of the overpayment against the balance of the honorarium due to him. It denies that it ever accused the complainant of having deliberately acted in bad faith or of having committed fraud,

and notes that his allegations in that respect rest on the mistaken belief that the procedure applied to him was of a disciplinary nature. According to the Organization, Staff Rule 302.3.172 is not intended to deal with fraudulent claims, as the complainant contends, but simply provides a framework for dealing with overpayments which are, in most cases, the result of bona fide error.

The Organization further argues that, in view of the circumstances surrounding the complainant's case, it considers that the two-year prescription period stipulated in Staff Rule 302.3.172 does not apply. It notes, in particular, that the existence of the overpayment was well documented and that the complainant was fully aware of the amount he was supposed to receive under the terms of his separation agreement. The patent difference between the latter and the amount he actually received could not have gone unnoticed by any reasonable person, much less by the complainant who, as a former Finance Officer, was well acquainted with payment procedures. By failing to seek an explanation with regard to the overpayment, the complainant neglected the duty of loyalty he owes to the Organization.

The FAO asserts that it had a legitimate interest in recovering the overpayment, given that it was made without any basis – hence constituting unjust enrichment – and involved a substantial amount. In its opinion, the complainant's physical and mental condition at the time of separation is irrelevant to the core issue of the complaint and has no bearing on the question of whether he received the overpayment in good faith. While acknowledging that some time had elapsed before it sought to recover the overpayment, it considers that it acted reasonably vis-à-vis the complainant, since it was willing to receive his proposals for settling the issue. It denies having caused him any injury which would justify the relief claimed.

D. In his rejoinder the complainant asserts that the complaint is receivable. He argues that the letter of 19 June 2007 did constitute a final administrative decision, as it confirmed the Organization's earlier position – as formulated in the letter of 21 March – and

allowed him no other recourse than the appeal procedure. Moreover, by withholding the payment of his honorarium the FAO had already taken action consistent with its decision.

On the merits, the complainant presses his pleas. He explains that he is still not in a position to verify the exact amounts of the payments received in termination emoluments, as the relevant bank account was closed in 2001 and the bank statements destroyed. The reason he decided to pay the amount requested by the FAO was to put an end to the “malicious and vicious insinuations” that he had used the appeal procedure to avoid repayment. He adds that he would not have refused to look into the matter had the Organization made a proper and courteous request instead of insinuating that he had acted in bad faith.

E. In its surrejoinder the FAO reiterates its position both on the receivability and the merits of the complaint. It provides documents to support its assertion that the overpayment was indeed received by the complainant and observes that duplicates of bank statements for his account could easily be obtained. It also points out that the complainant benefited from the overpayment because the Organization did not request reimbursement of the interest thereon, which he was thus allowed to keep.

CONSIDERATIONS

1. The complainant impugns the Director-General’s decision of 15 May 2009 to reject his appeal against the accusation of having acted in bad faith, the request that he reimburse an alleged overpayment and the suspension of the payment of the balance of his consultancy honorarium. The Appeals Committee, in its report dated 14 November 2008, recommended that “the Organization reiterate that no offence was intended in the correspondence addressed to the [complainant] dated 21 March and 19 June 2007”; that “such correspondence and documents relating thereto be removed from the [complainant’s] person[nel] file”; and that “the balance of the honorarium [...] be paid to him without further delay”. It found that

no administrative decision had been made by the Organization concerning the overpayment and settlement thereof, and therefore upheld the Organization's plea of non-receivability as to that issue. In his decision of 15 May 2009 the Director-General agreed with the Appeals Committee's findings regarding the non-receivability of the appeal with respect to the overpayment issue and the conclusion that no offence was intended by the Organization. However, he decided not to accept the recommendations of the Appeals Committee for three reasons. Firstly, as it had already been clarified in the letter of 19 June 2007 that no offence was intended, he considered it unnecessary to revisit the issue. Secondly, the complainant had been informed in that same letter that all records of the related correspondence would be removed from his personnel file once the matter was resolved, but as the matter was still open, the Director-General noted that there was no valid reason to remove the documents. Thirdly, the decision to withhold the balance of the complainant's honorarium "was the consequence of the discovery of the overpayment" and was fully justified by a general principle of law governing the recovery of undue payments.

2. The Tribunal considers the letter of 19 June 2007 to be a final administrative decision to claim reimbursement of the overpayment that occurred at the time of the complainant's separation from service in October 2000. In this regard, it should be noted that the letter of 21 March 2007 stated that it was "intend[ed] to pursue the reimbursement or the recovery of the overpayment" but that, prior to proceeding in that regard, "the Organization [would] examine any observations which [the complainant] might wish to make". The complainant made several observations in his letters of 7 and 15 April 2007 and, in the former, requested immediate release of the balance of his honorarium. There was no response to that request in the letter of 19 June 2007. Rather, the officer signing that letter stated that she "look[ed] forward to receiving [the complainant's] proposals for effecting the settlement of the outstanding amount". The continued withholding of the balance of the complainant's honorarium is

explicable only on the basis of a final decision to seek reimbursement of the overpayment. This, coupled with the officer's statement that she looked forward to receiving the complainant's proposals for reimbursement, has the consequence that the letter of 19 June 2007 must be construed as a final administrative decision to claim reimbursement for the overpayment. Accordingly, the complainant's internal appeal was receivable with respect to that claim, as is his complaint.

3. In the letter of 21 March 2007 the Organization identified the existence of a debt in respect of which it was claiming reimbursement from the complainant on the basis that, "as a Finance Officer [...] [he] could not [have] ignore[d] that there was a patent disproportion between [his] entitlement[s] under the terms of the agreed separation and the amounts which [he had] received", and therefore the time limit established by Staff Rule 302.3.172 did not apply. Staff Rule 302.3.172 states that "[t]he right of the Organization to claim from a staff member any overpayment made and received in good faith shall lapse two years after such overpayment was made". The Tribunal is of the view that the decision to seek reimbursement is flawed. The evidence does not establish absence of good faith on the part of the complainant. Good faith, as a general principle of law, must be assumed until the contrary is established. Moreover, taking into account the complainant's mental and physical health at the time of his separation from the Organization, the fact that multiple payments of varying amounts related to his separation were made by the Organization in that time frame, the fact that his wife was also retiring and receiving similar payments from the same Organization at the same time, the fact that in the letter of 9 October 2000, outlining the payments due upon his separation, it was specified that "the [listed] amounts are given as approximate" and finally, the fact that for 32 years he received his salary and emoluments without problems, the Tribunal accepts that, regardless of his previous functions, the complainant did not study and verify each individual payment at the time of his separation.

4. In view of the above, the Organization had no reason for claiming reimbursement outside of the two-year time limit specified in Staff Rule 302.3.172. Furthermore, it follows that as no legal debt existed, the Organization should not have suspended payment of the balance of the complainant's honorarium for his consultancy work, nor should it have refused to remove the contested documents from his personnel file requesting that it first receive the repayment from the complainant. The Tribunal notes that in the defendant's reply, dated 10 December 2007, to the complainant's initial appeal to the Director-General, it was stated that a review of outstanding debts owed to the Organization had begun in 2004, which was already two years past the two-year time limit for requesting reimbursement from the complainant, and that the October 2000 overpayment to him had been discovered in 2006. It may also be noted that it appears unusual that the Administration did not notify the complainant of the overpayment before March 2007 and did not request that he reimburse it until after the FAO had rehired him as a consultant.

5. The Organization contends that as the complainant has repaid the amount requested in full, there is no longer a cause of action for the complaint. However, notwithstanding that the complainant does not seek repayment of the 16,725 United States dollars which he paid to the Organization on 14 July 2009, he claims material and moral damages in respect of the injuries flowing from the decision of 19 June 2007, as well as an official apology and costs. Thus, there is a cause of action.

6. It results from the above that the impugned decision, as well as the decision of 19 June 2007, must be set aside. The complainant is entitled to moral damages in the amount of 20,000 dollars. The Tribunal will also order the Organization to remove the contested documents relating to the request for reimbursement from the complainant's personnel file. However, it is clearly beyond the competence of the Tribunal to order an organisation to apologise as

requested by the complainant (see Judgments 968, 1591 and 2605). This claim will therefore be dismissed, as will his claim for material damages, which has not been substantiated. As he succeeds in part, the complainant is entitled to costs in the amount of 2,000 dollars.

DECISION

For the above reasons,

1. The decisions of 15 May 2009 and 19 June 2007 are set aside and all related contested documents and letters shall be removed from the complainant's personnel file.
2. The FAO shall pay the complainant moral damages in the sum of 20,000 United States dollars.
3. It shall also pay him costs in the sum of 2,000 dollars.
4. All other claims are dismissed.

In witness of this judgment, adopted on 20 May 2011, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen

Catherine Comtet