

119th Session

Judgment No. 3400

THE ADMINISTRATIVE TRIBUNAL,

Considering the first, second and third complaints filed by Ms S. A. against the Food and Agriculture Organization (FAO) on 18 May 2012 and corrected on 22 June and 3 July, the FAO's replies of 11 October, the complainant's rejoinders of 15 November 2012 and the FAO's surrejoinders of 21 March 2013;

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 and the pleadings may be summed up as follows:

A. The complainant is a former staff member of the FAO. She joined the Organization in July 2005 as Chief of Procurement in the Administrative Services Division (AFS/CSA) at grade D-1. In July 2006 her appointment was confirmed and it was extended for two years. In July 2008 it was extended for a further eighteen months, i.e. until 31 December 2009. It was subsequently extended for a final six-month period until 30 June 2010. The complainant separated from service on that date.

The events giving rise to the present complaints can be traced back to 1 October 2008, when Ms P. took up her duties as the new Director of AFS/CSA and became the complainant's first-level supervisor. On 6 January 2009 the complainant filed a formal complaint of harassment against Ms P. The Director of the Human

Resources Division (CSH) referred the matter to the Investigation Panel, which delivered its report on 8 December 2009 concluding that there had not been harassment and that the complaint was therefore unfounded. Based on this conclusion, the Director, CSH, decided not to take any action against Ms P. The complainant appealed this decision to the Director-General but her appeal was rejected. She then filed an appeal with the Appeals Committee. In its report of 23 January 2012, the Committee found that there had been incidents of harassment against the complainant and it recommended that the Organization consider paying her appropriate moral damages. In a letter of 25 April 2012, the Administration rejected the complainant's appeal on the grounds, *inter alia*, that the Appeals Committee had erred in concluding that Ms P.'s conduct in the incidents identified constituted harassment under the FAO's Policy on the Prevention of Harassment, contained in Administrative Circular No. 2007/05. That is the decision that the complainant impugns in her first complaint to the Tribunal.

Prior to that, on 23 November 2009, Ms P., in her capacity as the Director of AFS/CSA, issued the complainant's 2009 Performance Appraisal and Achievement Record (PAAR) – covering the period from 1 October 2008 to 25 November 2009 – in which she rated the complainant's performance “unsatisfactory – performance consistently well below expected standards for the grade” and recommended the non-extension of her appointment beyond its expiry date of 31 December 2009. The Administration nevertheless decided to extend the complainant's contract for six months, *i.e.* until 30 June 2010, pending the submission by the Investigation Panel of its report on her complaint of harassment against Ms P. The complainant was notified of this decision by a letter of 30 November 2009. On 20 January 2010 the Assistant Director-General of Corporate Services (CS) decided, in his capacity as the complainant's second reporting officer, to endorse the rating “unsatisfactory”.

The complainant lodged appeals with the Director-General against her 2009 PAAR and the decision to extend her contract for six months rather than one year, but both appeals were rejected. She then

filed appeals with the Appeals Committee. By a letter of 22 April 2010 she was informed that, pursuant to Ms P.'s recommendation, her contract would not be extended beyond 30 June 2010. The Appeals Committee submitted its reports on the complainant's appeals against her 2009 PAAR and the decision to extend her contract by six months on 1 August and 11 October 2011 respectively. It found by a majority that her 2009 PAAR was tainted by procedural defects. It thus recommended that the relevant appeal be upheld and that the Director-General review the relevant PAAR and take appropriate action – two members of the Committee appended a minority opinion. With regard to the extension of her contract, the Committee recommended that the relevant appeal should be rejected as unfounded. By two separate letters dated 6 March 2012, the Administration rejected the complainant's appeals against her 2009 PAAR and the six-month extension of her contract. These are the decisions which the complainant impugns in her second and third complaints before the Tribunal.

B. In her first complaint the complainant argues that the Director of CSH should have immediately recognised the veracity of her harassment allegations and should accordingly have taken disciplinary action against Ms P. without referring the matter to the Investigation Panel. She believes that the witnesses who testified before the Investigation Panel were biased, as they had the same nationality as Ms P. and reported to her, and that the Investigation Panel was not equipped to investigate her complaint. Its conclusion that the facts would amount to harassment if intent could be established, cannot stand because the FAO's Policy on the Prevention of Harassment does not require intent. By accepting the Investigation Panel's application of the standard of preponderance of evidence, the Director of CSH demonstrated "gross negligence, incompetence or impartiality". Moreover, the Assistant Director-General of CS interfered in the harassment complaint and sought to take retaliatory action against her, but failed to impose an administrative sanction on Ms P., although her behaviour warranted such action.

In her second complaint the complainant submits that her 2009 PAAR was compromised in several respects. In particular, it was

tainted by manifest error because it should have covered the period from August 2008 to June 2009, not that from October 2008 to November 2009, and no incidents occurring outside that period should have been considered. Moreover, from November 2008 to April 2009 she was assigned duties which went beyond her statutory responsibilities and there was an increase in the level of authority delegated to her, a fact which is in contradiction to the outcome of her appraisal. The negative appraisal of her work was the result of prejudice on the part of Ms P., against whom she had filed a harassment complaint, and the Assistant Director-General of CS, for whom there was evidence of partiality. The complainant adds that her PAAR was conducted in breach of the FAO's rules and procedures, in particular Key Information Circular (KIC) No. 93/21, because it was not completed six months before the expiry of her contract, it was not transmitted to her in a sealed envelope, and her case was not referred to Human Resources, even though her appraisal resulted in her separation from the FAO only four days before she would qualify for a pension from the United Nations Joint Staff Pension Fund. Emphasising that her earlier performance exceeded expectations, she accuses the Organization of deliberate, careless and irresponsible handling of her case and of bad faith.

In her third complaint the complainant alleges that there were no valid reasons for the Administration's decision to renew her contract for six months, rather than one year. Indeed, at the time when that decision was taken, her PAAR had not yet been concluded, there was no other pending issue that could have justified that decision, and all administrative action was purportedly suspended pending the resolution of her harassment complaint. The decision was communicated to her by e-mail after working hours on 30 November 2009 and did not, therefore, meet the requirements that such notice must meet. She reproaches the FAO for acting in bad faith and in violation of its rules and regulations, particularly KIC No. 93/21. In her opinion, the FAO's attitude confirms that the extension of her contract by six months aimed solely at meeting procedural requirements, rather than giving her a real chance to improve. Indeed, her question as to who would monitor her performance during that period and against what

objectives was left unanswered and the procedure applied to monitor her performance and conduct was outside the statutory framework that was applicable at the time. She adds that it was contrary to the Organization's practice to offer her a contract extension of less than one year and, by so doing, the FAO modified the terms of her appointment, thereby depriving her of certain entitlements, such as home leave and exemption from taxes.

In her first complaint the complainant asks the Tribunal to order exemplary and punitive damages, administrative sanctions against "the concerned" and that the FAO "be purged" of her harassers. She claims moral damages equivalent to half a month's salary for each month between January 2009 and the date of the Tribunal's judgment and payment by the FAO of the cost of her "psychological treatment" and of "a replacement agency". In her second complaint the complainant asks the Tribunal to order a formal apology from and an official condemnation of the FAO and an injunction to "sanction the concerned". She requests that her PAAR be declared invalid, that she be awarded financial compensation equivalent to the loss that she has incurred during the relevant period in terms of within-grade step increases at the D.1 to D.2 level, medical expenses, home leave, loss of benefits, loss of dependency benefits and the cost of storing her personal effects, and that she be reintegrated or, alternatively, paid salaries and benefits until her statutory retirement age. In her third complaint the complainant seeks payment in full of the salary and other entitlements that she would have received if her contract had been extended for one year, including home leave and reimbursement of taxes paid, minus the amounts she received in salary and other entitlements during the six-month extension of her contract or, alternatively, damages in the amount of 150,000 euros. She claims 100,000 euros in moral damages.

C. In its reply to the complainant's first complaint the FAO argues that none of the incidents on which the complainant's allegations were based qualified as harassment under the FAO's Policy on the Prevention of Harassment. In fact, the exchanges and comments identified by the complainant as harassment were legitimate

instructions by Ms P. in her role as the Director of AFS/CSA. The complainant showed hostility towards Ms P. and never made any serious effort to resolve her differences with her. The harassment complaint against Ms P. was frivolous and, in reality, it was the complainant who was the harasser. The Director of CSH acted in full conformity with the above-mentioned Policy and the requirements of due process when he referred her allegations to the Investigation Panel and he decided, after reviewing the Panel's report, not to take action against Ms P. The harassment complaint was properly investigated by the Investigation Panel and the Administration was correct to set aside the Appeals Committee's recommendations, since the latter overstepped its mandate by replacing the Panel's findings with its own assessment of the facts, did not review the full record of the investigation, showed no restraint when reviewing it and misinterpreted the Panel's report.

In its reply to the complainant's second complaint the FAO points out that her claims before the Tribunal on the issue of her 2009 PAAR were not made in her appeal to the Director-General. On the merits, it denies the existence of a manifest error in the complainant's 2009 PAAR and submits that the examples of unsatisfactory performance listed by the Director of AFS/CSA were accurate and detailed. It also denies that any facts occurring outside the review period were taken into account. In determining that the period covered by the PAAR would be from October 2008 to November 2009, the Administration acted within the discretion afforded to it by Administrative Circular 87/13 of 17 March 1987, which provides that "the frequency of the appraisal may be adjusted in case of departure or transfer of the staff member or the supervisor". The complainant's prior satisfactory service cannot mitigate or excuse her poor performance during the period under review. As for the increase in level of authority delegated to her, this was prompted by the FAO's decentralisation policy and organisational objectives, and was certainly not a sign of the Director of AFS/CSA's faith in the complainant's professional competence. The complainant failed to demonstrate prejudice or animosity on the part of her appraisers and, contrary to what she claims, all pertinent rules were respected. Moreover, KIC No. 93/21 was not applicable,

because it is not part of the FAO's rules, because it was obsolete and also because it was not intended for general distribution. The Administration complied with the six-month notice requirement, given that it extended the complainant's contract until 30 June 2010, and the confidentiality of her assessment was respected – her appraisal was delivered to her electronically via her FAO e-mail account. There was no deliberate, careless or irresponsible handling of the complainant's case, nor was there any element of bad faith.

In its reply to the complainant's third complaint the FAO submits that the complainant never challenged internally the decision of 22 April 2010 not to extend her contract beyond 30 June 2010 and, therefore, the relief she now seeks does not flow from her appeal. Similarly, the claims for home leave and the reimbursement of taxes paid are irreceivable for failure to exhaust internal remedies. On the merits, the Organization explains that the complainant's appointment was extended by six months in order to allow for the completion of the procedures on the harassment complaint and her PAAR. This was necessary to ensure that the Investigation Panel's findings and the parties' comments would be taken into account when considering the recommendation of non-renewal. Contrary to what the complainant contends, the Administration did not decide to suspend all administrative decisions regarding the complainant, but rather any administrative decision on the recommendation not to renew her contract. The six-month extension she was granted was fully in line with the FAO's rules and procedures, which provide that fixed-term appointments expire according to their terms, do not require the Organization to give notice of non-extension, and do not carry any expectation of renewal. Even assuming that there is a practice in the FAO regarding the duration of fixed-term appointments, this conferred no rights on the complainant, as the duration of any appointment is determined on the basis of the Organization's interests. The decision to extend the complainant's contract for six months was a discretionary decision subject to a limited review and the complainant has not established that it carried any flaw warranting it being set aside.

D. In her rejoinders the complainant strongly rejects the contention that her harassment complaint was the result of her non-selection for the position of Director of AFS/CSA. She emphasises that her negative PAAR for 2009 had disastrous consequences for her career, which had consistently been extremely successful both during her service with the FAO and prior to that. She explains that the decision to extend her contract by only six months amounted to a modification of the terms and conditions of her appointment, because it deprived her of certain privileges attendant to her position. She maintains her claims in their entirety.

E. In its surrejoinders the FAO reiterates that the complainant acted out of resentment when she filed a harassment complaint against the Director of AFS/CSA. It considers that it was fully justified to set aside the Appeals Committee's recommendation, as the latter went beyond its mandate and misinterpreted the considerations underpinning the Investigation Panel's conclusions. It fully maintains its position on the complainant's PAAR for 2009 and the six-month extension of her contract.

CONSIDERATIONS

1. The complainant commenced working with the FAO in July 2005 on a one-year contract in a senior position in the Procurement Service. The contract was extended by two years in July 2006 and again in July 2008 to 31 December 2009. On 30 November 2009 the complainant was advised that her contract would be extended for six months only (the November contract decision). This occurred against a background in which, in October 2008, a new Director of the Administrative Services Division (AFS/CSA), Ms P., commenced service with the FAO. The complainant had applied unsuccessfully for this position. On 6 January 2009 the complainant lodged a claim of harassment by Ms P. (the harassment claim). In January 2010, the complainant's 2009 Performance Appraisal and Achievement Record (2009 PAAR) was finalised.

The complainant challenged, by way of internal appeal, the FAO's response to the harassment claim, the November contract decision and the 2009 PAAR. The appeals took various routes and culminated in reports of the FAO Appeals Committee of 23 January 2012, 11 October 2011 and 1 August 2011 respectively. These reports led, in turn, to decisions by the Deputy Director-General for Knowledge of 25 April 2012 in relation to the harassment claim and separate decisions on 6 March 2012 in relation to the November contract decision and the 2009 PAAR. The complainant impugns these three decisions in three complaints to this Tribunal which were all filed on 18 May 2012. Given that there are common and overlapping factual issues, it is convenient to join the three complaints.

2. In relation to the harassment claim, the Appeals Committee concluded that there had been proven incidences of harassment and recommended that the FAO consider paying the complainant appropriate moral damages. The incidence of harassment established to the satisfaction of the Committee involved continual, unjustified and unnecessary comments and deliberate insults relating to the complainant's professional competence as well as the exclusion of the complainant from normal communications. Other aspects of the complainant's claim were rejected by the Committee. The Deputy Director-General did not accept the conclusions of the Appeals Committee and, accordingly, rejected the complainant's appeal in its entirety.

3. In relation to the November contract decision, the Appeals Committee concluded that the administrative action to extend the complainant's contract for six months was legitimate and within the discretionary powers of the FAO. The Committee also concluded there was no regulation or rule in the Administrative Manual that states that a one-year extension is obligatory, even though this appeared to be the practice of the FAO. The Committee recommended that the appeal be rejected as unfounded. This recommendation was accepted by the Deputy Director-General who rejected the appeal.

4. In relation to the 2009 PAAR, the Appeals Committee was divided in its opinion. The majority (three members) concluded that the 2009 PAAR was affected by procedural defects. The majority recommended that the Director-General review the PAAR and also recommended that the appeal be upheld. The minority (two members) took a slightly less favourable view of the complainant's case. While agreeing that the appeal should be upheld, the minority disagreed with the suggestion that had the procedural rules been complied with, it would have made a difference to the outcome. The minority also disagreed with the suggestion that management should have intervened to address the situation and that what occurred significantly prejudiced the complainant's 2009 PAAR. Finally, the minority believed the majority should have made clear that the Appeals Committee did not express an opinion on the validity of the assessment of the complainant's performance in her 2009 PAAR. The Deputy Director-General decided to reject the Committee's recommendation, dismissed the complainant's appeal as unfounded on the merits and rejected the complainant's request for review of her 2009 PAAR.

5. In her brief concerning the harassment claim, the complainant essentially adopts the conclusions of the Appeals Committee though she takes issue with certain of its specific conclusions. She argues there was bias on the part of some involved in the initiation and consideration of the harassment claim, that the process of investigation had been biased (particularly before the Investigation Panel) and that the FAO had made "inaccurate and fallacious statements".

In her brief concerning the November contract decision, the complainant identifies several features of the decision-making process (to extend her contract only by six months) that demonstrate, so she submits, that the decision was not regularly made.

Finally, in her brief concerning the 2009 PAAR, the complainant advances five arguments. The first is that the 2009 PAAR was tainted by manifest errors, some factual others conclusory. The second is that the 2009 PAAR was tainted by partial, deliberate and subjective judgment. The third is that established procedures were not followed

in finalising the 2009 PAAR. The fourth is really of more general application and concerned the handling of her grievances generally. The fifth is that the 2009 PAAR was tainted by bad faith.

6. It is desirable to commence with a consideration of the question of whether the complainant had been harassed. A convenient way of commencing to address that topic is to consider the findings of the Appeals Committee and the Deputy Director-General's criticisms of them. It should be said that the report of the Committee manifests a comprehensive and thoughtful consideration of the evidence and applicable principles. Its conclusions are rational and balanced. In these circumstances its findings warrant "considerable deference" (see Judgment 2295, consideration 10). That said, the place and role of the Appeals Committee in the internal appeal process in the present case is raised by the FAO in submissions which are discussed shortly.

As noted earlier, the Appeals Committee found that the complainant had been subject to continual unjustified and unnecessary comments and deliberate insults relating to her professional competence. These are findings of fact. The main point of departure in the approach taken by the Deputy Director-General was that the Appeals Committee (to quote from her letter of 25 April 2012) did not pay any or sufficient regard to the approach of the Investigation Panel, which "did not find that the comments were either unnecessary or unjustified comments related to [the complainant's] professional competence, that they were deliberate insults, or that they otherwise constituted harassment". It should be noted that in the internal appeal procedures, complaints such as the present can, if unresolved informally, be dealt with by an Investigation Panel and only later by the Appeals Committee in the event that there is an appeal.

7. The first point to be made is that the Deputy Director-General really did not explicitly address the question of whether, in fact, there had been harassment involving continual, unjustified and unnecessary comments and deliberate insults related to the complainant's professional competence. That is to say, the Deputy Director-General did not express an affirmative finding there had not been. Rather, at least

implicitly, the Deputy Director-General was adopting and endorsing the approach of the Investigation Panel. In its reply in the proceedings before the Tribunal, the FAO maintains this approach in the sense that it advances the conclusions of the Investigation Panel as correct and contests the conclusions of the Appeals Committee. This argument is advanced on several bases. Firstly, the FAO submits that the Committee “overstepped its mandate when it apparently reinvestigated the harassment claim when it was in a clearly inferior position to do so as compared with the Investigation Panel” and the Committee “should have carried out a more limited review on aspects of procedure, questions of application of law and the internal coherence of the Report of the Investigation Panel”. Secondly, the FAO submits, the Committee did not show appropriate restraint in reviewing the report of the Investigation Panel. Thirdly, the Committee did not review the full record of the investigation. Lastly, the FAO submits, the Committee misinterpreted the report of the Investigation Panel.

However there are several difficulties with this challenge to the Appeals Committee’s conclusion that the complainant had been subjected to continual, unjustified and unnecessary comments and deliberate insults relating to her professional competence. The first is that, as the Investigation Panel noted in its report, “[m]ost, if not all, of the evidence provided in connection with this case is written and both the [c]omplainant and [Ms P.] agree on most of the events that took place. The difference between the two is whether these events are due simply to different management styles or whether the facts demonstrate harassment.” Accordingly it was not as important, as suggested by the FAO, for the Appeals Committee to have had recourse to all the evidence before the Investigation Panel.

What the Investigation Panel said about this allegation was that, while the complainant clearly felt offended, Ms P.’s actions were not deliberately intended to offend or otherwise harm the complainant and that none of the comments made were intended to refer to the complainant’s own professional competence. Thus, the second difficulty confronted by the FAO in supporting the Investigation Panel’s conclusions and challenging those of the Appeals Committee

is that the Panel takes too narrow a view of what constitutes harassment, a matter acknowledged by the Deputy Director-General in the impugned decision. The essential element in the definition in the FAO's Policy on the Prevention of Harassment (Administrative Circular No. 2007/05) is that harassment occurs if there is "improper behaviour by a person that is directed at, and is offensive to, another individual and which the person knew or ought reasonably to have known would be offensive". Whether behaviour is improper or not depends on the content of the behaviour, not intention. At least ordinarily, whether the behaviour is directed at and whether it is offensive to another person does not, again, depend on intention or at least an intention to harass. Also the definition allows for the possibility that the person engaging in the improper behaviour did not know it was offensive but ought reasonably to have known. At least in this latter circumstance, intention would be irrelevant. These comments broadly correspond with the jurisprudence of the Tribunal on the question of mobbing (see, for example, Judgment 2524, consideration 25).

The third difficulty is that FAO does not advance any legal basis in support of the suggestion that the Appeals Committee's role is limited in the way it suggests.

8. In the impugned decision, the Deputy Director-General observed, when comparing the approach of the Appeals Committee and the Investigation Panel (having acknowledged that the Panel erroneously focused on intent), that while the Panel found that the comments complained of were continual, the Panel "did not find that the comments were either unnecessary or unjustified comments related to [the complainant's] professional competence, that they were deliberate insults, or that they otherwise constituted harassment". This is true, in a sense, but it overlooks the fact that the Panel did not find that the comments were necessary or justified or did not reflect, in any way, on the complainant's professional competence. Indeed the Panel concluded "they reflected negatively on [the complainant's] professional competence".

Having regard to the report of the Appeals Committee and generally to the material provided in support of the complainant's first complaint, the Tribunal is satisfied there was harassment involving continual unjustified and unnecessary comments and deliberate insults relating to the complainant's professional competence.

9. In the impugned decision, the Deputy Director-General rejected the other positive finding of harassment made by the Appeals Committee. It was to the effect that the complainant had been excluded from normal communication. The stated reason for doing so was that the Committee mischaracterised the Investigation Panel's conclusions by failing to recognise that the Panel considered that Ms P. had exercised her management responsibilities in excluding the complainant from communications in the three incidents the complainant cited, but that she had otherwise "continued to work and communicate on other matters on a day-to-day basis with [the complainant] even when [the complainant] was uncooperative" (a quotation from the Panel's report used by the Deputy Director-General). However this response does not fully reflect what the Panel decided. It made three other findings or observations. The first was that the incidents raised by the complainant were de facto an exclusion of the complainant from normal communication. The second was that some of these actions reflected negatively on the complainant's professional competence. The third was that the Panel believed that it was not within its competence to evaluate Ms P.'s management decisions and whether they conform to FAO's rules and regulations with respect to hierarchical relationships. As the Committee pointed out in its report, the definition of harassment in Administrative Circular No. 2007/05 included incidence of "continual exclusion of a person or group from normal communication". It was open to the Committee to conclude, as it apparently did, that, in this respect, harassment had occurred. It was correct in doing so.

However the Tribunal is satisfied that the approach of the Appeals Committee to the other allegations of harassment by the complainant was open to it and was correct. Moreover, the other matters raised by the complainant in her complaint are not made out. To the extent that she alleges bias at the time the matter was being investigated by the

Investigation Panel, she was entitled to, and did receive, an impartial consideration of her case by the Appeals Committee. In saying this, the Tribunal is not concluding there was bias. In the circumstances of this case, whether there was or was not is of no real significance. The Tribunal will address what is an appropriate remedy for this harassment later in these considerations.

10. In relation to the complainant's grievance about the extension of her contract by only six months from January to June 2010, the Appeals Committee recommended that the appeal be rejected as unfounded. The Tribunal observes that the Appeals Committee was composed of the same individuals who dealt with her harassment claim some months later. Also, as noted earlier, the Deputy Director-General accepted the recommendation and rejected the appeal. The Tribunal also observes that, as pointed out by the FAO, this complaint does not concern the FAO's decision of a more enduring character, namely the decision not to renew the complainant's appointment beyond June 2010 that was made on 22 April 2010.

11. The complainant was sent a memorandum on 30 November 2009 telling her that FAO had decided to grant her an extension of her appointment for a period of six months, until 30 June 2010. Earlier in the memorandum, four points were noted. The first was that Ms P. had recommended that the complainant's appointment not be renewed beyond its expiry on the basis of poor performance as well as issues relating to the complainant's conduct at work. The second was that the complainant had lodged a harassment claim against Ms P. The third was that the harassment claim had been referred to the Investigation Panel and that the investigation was, at that time, currently ongoing. The fourth was that the FAO would reserve its review of the recommendation of Ms P. and would not take any administrative action with respect to that recommendation until the Investigation Panel had completed its report and its findings had been considered. The memorandum noted that in view of these matters the extension would only be six months. It was also noted that during that period the

complainant's performance and conduct would be regularly monitored and, as appropriate, discussed with her.

The recommendation of the Appeals Committee and the decision of the Deputy Director-General were, in the circumstances, unexceptionable. The FAO was deferring a substantive decision on the continued employment of the complainant in circumstances where there were quite clearly two diametrically opposed positions at play. One was the position being advanced by Ms P. that, in substance, because of the complainant's performance and her conduct at work more generally the complainant should cease as an employee of the FAO. The other was the complainant's belief she was being harassed by Ms P., which if true, potentially had a material bearing on the worth or reliability of Ms P.'s opinion and recommendation. If Ms P. was harassing the complainant, her opinion and recommendation could well have been tainted by bias. The complainant's challenge to the decision to renew her contract for six months should be rejected.

12. In relation to the complainant's grievance about her 2009 PAAR, the Deputy Director-General rejected the recommendation of the Appeals Committee that the Director-General review the PAAR. In the Deputy Director-General's letter of 6 March 2012 conveying the impugned decision to reject the complainant's appeal about her 2009 PAAR, the Deputy Director-General analysed, critically, the conclusions of the Appeals Committee (and in some instances the conclusions of the majority). It is only necessary, in order to resolve the complaint before the Tribunal, to focus on one of the Committee's conclusions and the reasons for rejection.

13. The Tribunal recalls the sequence of events concerning the interaction between the complainant's complaint of harassment and the preparation and finalisation of the 2009 PAAR. It was on 6 January 2009 that the complainant filed her complaint of harassment by Ms P. It concerned events in late 2008. On 23 November 2009 Ms P. signed off on her assessment of the complainant's performance on the PAAR form for the period 1 October 2008 to 25 November 2009. The form as completed by Ms P. contained a 12-page highly detailed commentary

on the complainant's performance. On 8 December 2009 the Investigation Panel issued its report effectively exonerating Ms P. in relation to the claim of having harassed the complainant.

On 20 January 2010 the second reporting officer, the Assistant Director-General of CS, recorded his comments on the PAAR form. He endorsed the rating of unsatisfactory. He noted that his contact with the complainant had been occasional. The observations made included:

“The period of assessment was also marred by examples of lack of collaboration that came to my attention, demonstrating unsuccessful management of relationships with supervisors and reports. Incidents also include the triple action of her harassment complaint against the Director, AFS, her complaint of insubordination against a Senior Procurement Officer and her request for administrative action against former ADG, AF who had served as OiC, AFS during part of 2008, all of which have been found in the proceedings thus far to be unjustified on their merits.”

Quite what is meant by “incidents also include” is unclear. It is not clear whether they are incidents illustrative of the proposition in the first sentence or, in some way, are additional. More likely they are the former. Also, who provided the information which “came to [his] attention” is unclear but the inference can be drawn that it at least included Ms P. as one source, and probably the primary source. In addition, it may be that the opinion expressed was influenced by the outcome of the investigation by the Investigation Panel if that is what is comprehended by the expression “the proceedings thus far”. It was against this background that on 28 January 2010 the complainant sought review of the 2009 PAAR.

14. One of the grounds on which the Appeals Committee recommended the review of the 2009 PAAR was that it questioned “the appropriateness of a direct supervisor's having performed the performance assessment of a staff member who had previously filed a harassment claim against that supervisor, and the potential for compromised objectivity in the evaluation”. The Deputy Director General's response was to the following effect. Firstly, she said that the Committee did not state whether it considered that such circumstances affected the validity of the complainant's 2009 PAAR. It is true that, literally, the Committee did not do so. However the

clear inference from what the Committee wrote in its report, is that it did affect the validity.

In any event, in the ordinary course it would not be easy for a person against whom a claim of harassment had been made by a subordinate, to impartially and dispassionately evaluate the performance of the subordinate when the claim of harassment was well based. That this is so, makes the Deputy Director-General's next observation in her response (that the complainant had failed to demonstrate that Ms P.'s evaluation was biased), somewhat difficult to maintain even if, as the Deputy Director-General noted, there were numerous objective examples attached to the PAAR. Similarly the observation that Ms P. noted the complainant's achievements which was indicative of her good faith and balanced approach, does not pay sufficient regard to the likely impact of the fact that Ms P. was the subject of an allegation and complaint of harassment by the complainant.

Lastly, the Deputy Director-General noted that the Assistant Director-General of CS had made a similar assessment of the complainant's performance and that his evaluation was part of the mechanism designed to address instances of potential bias by the first-level supervisor. But as observed earlier, the Assistant Director-General's evaluation was most likely influenced by the views of Ms P. Also, when the impugned decision in relation to the 2009 PAAR was made on 6 March 2012, the Deputy Director-General had the report of the Appeals Committee of 23 January 2012 that had concluded there had been harassment. While the Deputy Director-General rejected the conclusions of the Committee on the harassment claim nearly two months later (on grounds which were flawed), a reasonable decision maker would have nonetheless entertained some doubts about the impartiality of Ms P. when rejecting a comparatively benign recommendation of the Committee to review the 2009 PAAR. The complainant has established that the 2009 PAAR should be set aside.

15. The complainant has succeeded in challenging the rejection of her appeal in relation to the harassment claim and the rejection of her appeal in relation to the 2009 PAAR. The complainant's

discussion of the remedies she seeks is somewhat discursive. Some of what she claims by way of relief is untenable. For example she asks for a recommendation and requirement that the FAO be purged of those who are engaged in harassment and unlawful activities. She also asks to be “reintegrated into the organisation at a D2 level” or, in the alternative, “to be compensated for loss of the permanent career status and all related benefit losses up to the age of [her] statutory retirement age”. However as the Tribunal observed earlier, these complaints do not concern the FAO’s decision of a more enduring character, namely the decision not to renew the complainant’s appointment that was made on 22 April 2010. The legality of that decision cannot now be challenged. The complainant also seeks exemplary and punitive damages. However, no basis for awarding such damages has been made out.

The Tribunal is satisfied that the appropriate remedy in the two complaints in which the complainant has succeeded is moral damages. There is little reason to doubt that, on the material before the Tribunal, the complainant was, in some respects, the author of her own destiny. She applied unsuccessfully for the position of Director of AFS/CSA and it is likely there was a measure of resentment directed toward the successful applicant, Ms P., and a reluctance to co-operate with her fully. This would have had implications for their working relationship. That this is so does not, of course, excuse the conduct of Ms P. that founded the harassment claim and which also fed into the challenge to the 2009 PAAR. The Tribunal concludes that 30,000 euros is an appropriate award of moral damages. The complainant is entitled to costs in the sum of 1,000 euros.

DECISION

For the above reasons,

1. The impugned decision of 25 April 2012, and that of 6 March 2012 insofar as it related to the 2009 PAAR, are set aside.
2. The complainant’s 2009 PAAR shall be removed from her personnel file.

3. The FAO shall pay the complainant 30,000 euros as moral damages.
4. It shall also pay the complainant 1,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 5 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ