

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S.
v.
FAO

127th Session

Judgment No. 4064

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr H. S. against the Food and Agriculture Organization of the United Nations (FAO) on 14 June 2016 and corrected on 14 July, the FAO's reply of 27 October 2016, the complainant's rejoinder of 24 January 2017, the FAO's surrejoinder of 3 May, the complainant's additional submissions of 18 August and the FAO's final comments thereon of 4 October 2017;

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 a request made by the Administration of the FAO that he provide comments, while he was on certified sick leave, on a report issued by the Investigation Panel (IP) appointed to investigate allegations of harassment against him.

Facts related to this case can be found in Judgment 4065, also delivered in public this day, concerning the complainant's second and third complaints.

The complainant was the subject of an investigation by an IP into a complaint of harassment against him. The IP issued a report in November 2013 which was forwarded to him by the Administration in

early December and he was invited to provide any comments within 10 working days. By an email of 11 December 2013 he requested an extension of the time-limit he had been given until after his return from pending annual leave and a subsequent two-week sick-leave period (he was scheduled to have surgery). His request was granted and he was given a new deadline of 10 working days after his return to work.

On 14 March 2014, while the complainant was still on sick leave, the Administration requested that he provide comments on the IP report within 10 working days in light of the advice of the FAO Chief Medical Officer (CMO) that he was medically fit to do so.

By an email of 24 March the complainant's lawyer wrote to the Administration and asked that the complainant be given 10 working days from his return to work from certified sick leave to provide comments on the IP report.

On 25 March the Director of the Office of Human Resources (OHR) wrote to the complainant and asked, pursuant to Staff Rule 302.6.217 and Manual paragraph 343.1.24, that he contact Dr F.-B., an orthopaedic specialist, to schedule a clinical evaluation in order to resolve any questions related to his sick leave. In his report of 11 April 2014 Dr F.-B. concluded that, from a purely orthopaedic point of view, the complainant was able to respond in writing to the IP report.

The complainant was subsequently hospitalised. After his discharge from hospital, by an email of 9 May 2014 he was informed by the Director of OHR that the deadline for the submission of his comments on the IP report was 10 working days from the date of the email.

Following the receipt of information from the complainant and his representatives regarding his health and capacity to submit comments on the IP report, on 20 May 2014 the Administration asked the complainant, pursuant to Staff Rule 302.6.217 and Manual paragraph 343.1.24, to contact another medical practitioner, Dr G., for an independent assessment of a different medical condition. After having examined the complainant, Dr G. issued a report dated 7 June 2014 in which he concluded, among other things, that the complainant was able to give written comments on the IP report and related communications from the FAO.

In an email of 2 July 2014 (which is the decision the complainant identifies on the complaint form as the impugned decision) the Director of OHR asked the complainant to provide his comments within 10 working days. The complainant appealed that decision to the Director-General on 10 July 2014.

However, by an email of 16 July to the Director of OHR the complainant provided his comments on the IP report. He included a list of documents which had not been provided to the complainant, despite previous promises from the Administration that they would be disclosed. The Administration acknowledged receipt of that email on 24 July, transmitted documents to him that had not been disclosed earlier and gave him an additional 10 working days to provide further comments. On 1 August the complainant's representative notified the Administration that the complainant's condition did not allow him to further engage in the matter. The complainant's appeal to the Director-General of 10 July was rejected on 8 September. In an appeal to the Appeals Committee dated 27 October 2014 he challenged the decision of 2 July. While the internal appeal process was ongoing, he filed the present complaint with the Tribunal.

The Appeals Committee issued its report on 25 January 2017 in which it recommended that the appeal be dismissed in its entirety. On 15 March 2017 the Director-General issued a final decision on the internal appeal in which he accepted the Appeals Committee's recommendation.

The complainant asks the Tribunal to find that the FAO violated his rights, subjecting him to anxiety and stress, for which he should be compensated. He asks the Tribunal to rescind the decision of 2 July 2014, as well as decisions dated 24 July 2014 and 3, 8, 12 and 17 September 2014. As an alternative to reinstatement with retroactive effect from 17 September 2014 until he reaches mandatory retirement age, he seeks the payment of an amount equivalent to 22 months' salary plus benefits, with interest. He requests that the period from 14 March 2014 to the date of the filing of his complaint be considered special leave with full pay and that all sick leave and annual leave days during this period be "credited" to him. Thus, he seeks reimbursement of all amounts deducted from his salary for the period during which he was on sick

leave with half pay. He claims payment, with interest, of recalculated accrued annual leave. He seeks damages for injury to his health in the amount of 150,000 euros, moral damages for harassment in the amount of 150,000 euros, 50,000 euros in moral and material damages for delay in the internal appeal process, and 700 euros in costs. He asks the Tribunal to hold the officials responsible for the contested decision accountable for their actions and to hold the members of the Appeals Committee accountable for abuse of authority, harassment and the issuance of discriminatory recommendations against him.

The FAO asks the Tribunal to dismiss the complaint as partly irreceivable and otherwise without merit.

CONSIDERATIONS

1. The central issue which is raised in this complaint is whether it was unlawful for the FAO to request the complainant to provide comments, while he was on sick leave, on the IP report of November 2013 regarding a harassment complaint against him.

2. In his brief, the complainant challenges what he refers to as “the decision of the Director [of] OHR of 2 July 2014, which [he] believe[s] is in conflict with the terms of [his] appointment”. On 10 July 2014 he appealed that decision and requested the Director-General to review it on the ground that it violated his right to certified sick leave, “an entitlement to allow staff members [to make a] full recovery [...] regaining [a] healthy and normal life including returning to work and resumption of official duties”. The complainant’s subsequent memorandum of appeal to the Appeals Committee dated 27 October 2014, which his supporting statement of grievance elaborated, was in similar terms. The complainant filed the present complaint with the Tribunal before the internal appeal proceedings were concluded. The FAO initially submitted that the complaint was irreceivable because a final decision had not been issued on the internal appeal. However, after the Appeals Committee subsequently issued its report and the Director-General took a final decision on the appeal on 15 March 2017, the FAO stated that it recognized

that its plea of irreceivability no longer applied. The parties have provided further submissions on the final decision. In the circumstances, the Tribunal deems the complaint to be directed against the Director-General's decision of 15 March 2017.

3. In the present complaint (as in his internal appeal before the Appeals Committee), the complainant refers to a series of "consequent decisions", which he states were wrongly taken after 2 July 2014 resulting in the termination of his service on 17 September 2014, and he asks the Tribunal to rescind these decisions. Two of the "consequent decisions" are the subsequent decisions by the FAO to dismiss him and the decision to dismiss him while on sick leave, which the complainant challenges in his second and third complaints. The "consequent decisions" are beyond the scope of the present complaint and the complainant's claims in this respect are irreceivable.

The Tribunal accepts the FAO's submissions that the complainant's claims related to acts of harassment allegedly committed against him are irreceivable. This is because he did not exhaust the internal means of redress that were open to him under the applicable rules, as Article VII, paragraph 1, of the Tribunal's Statute requires. For the same reason, the allegation that the CMO breached provisions related to the confidentiality of information about the medical conditions of staff members when he released information about the complainant's hospitalization to Dr F.-B. without his consent is also irreceivable.

4. The complainant was on certified sick leave when he was asked to comment on the IP report. He centrally contends that by requiring him to comment on the report while he was on sick leave, the FAO breached its own rules governing sick leave, particularly Staff Rule 302.6.21, because he was compelled to discharge official duties by undertaking work when certified sick leave precluded him from performing such duties. Staff Rule 302.6.21 relevantly states as follows:

"Staff members who are unable to perform their duties because of illness or injury [...] shall be granted sick leave in accordance with the following [stated] provisions [...]."

The complainant states that his treating doctors placed him on sick leave, which meant that he was unable to engage in work-related activities. He refers to sick leave under Staff Rule 302.6.21 as “a social benefit and entitlement to allow recovery”. He argues that this provision entitled him to a legitimate and reasonable expectation that he would only attend to his medical concerns while on sick leave in order to recover and to restore normal functioning as this is the inherent purpose for requiring certification by medical experts for sick leave. He insists that the requests by the Director of OHR that he undergo independent health evaluations to determine whether he was fit to comment upon the IP report were beyond the scope of Staff Rule 302.6.217 and Manual paragraph 343.1.24, which were cited as the authority for the requests.

5. Staff Rule 302.6.217 states as follows:

“When there is a difference of opinion on the medical facts regarding sick leave under these Rules, the Chief Medical Officer or the staff member may request that the matter be referred to a recognized medical institution designated by the Organization for advice. Further sick leave may be refused or the unused portion withdrawn if the physician designated by the recognized medical institution determines that the staff member is able to return to duty.”

Manual paragraph 343.1.24 relevantly states as follows:

“When requested by the Organization, the Medical Unit conducts or authorizes and reviews medical examinations for purposes related to [...] sick leave.”

6. It seems plain that the Director of OHR mistakenly relied upon Staff Rule 302.6.217 as a basis for requiring the complainant to undergo further evaluations, as that rule permits such evaluations specifically to settle “a difference of opinion on the medical facts regarding sick leave” in order to decide whether sick leave may be refused or the unused portion withdrawn if the designated physician determines that the staff member is able to return to duty. It does not provide a basis on which a staff member may be required to undergo further evaluation while on sick leave in order to determine whether she or he is fit to comment on an IP report.

7. The FAO accepts that it could not have required the complainant to perform the duties that attach to his post while he was on certified sick leave. It insists, however, that the request to comment upon the IP report did not require him to perform any work-related duties under the terms of reference of his post, as, in its view, there is a distinction between performing the duties of a post, which cannot be done while a staff member is on sick leave, and complying with general responsibilities arising under a contract of employment. The FAO submits that a request to comment on an IP report falls under the latter and that sick leave does not excuse that responsibility unless the staff member is medically unfit to do so. Moreover, the FAO points out that the request for the complainant's comments was made pursuant to the investigation of a harassment complaint in order to fulfill the requirements of Part II(b)(iv)(g) of its Policy on the Prevention of Harassment. This provision states as follows:

“The Director, AFH will provide the complainant and the respondent with a copy of the report of the Investigation Panel, which shall be strictly confidential. The complainant and the respondent may submit comments on the report of the Investigation Panel in writing within 10 working days of receipt of the report.”

The FAO recalls that the Policy on the Prevention of Harassment, as well as the Tribunal's case law, requires it, out of its duty to a staff member who makes an allegation of harassment, to investigate the allegation promptly and thoroughly while according due process to the person who is accused of the harassment. The FAO insists that it was necessary to invite the complainant to comment on the IP report in order to discharge its duty to the persons who had lodged the harassment complaint and in fairness to all of the parties in its effort to comply with Part II(b)(iv)(g) of the Policy on the Prevention of Harassment.

8. Based on the evidence before the Tribunal, there is nothing in the FAO rules regime and no proven practice which provide guidance on how the requirement of Part II(b)(iv)(g) of the Policy on the Prevention of Harassment is to be fulfilled where a staff member who is accused of harassment is on certified sick leave. Given the FAO's duty under the Policy on the Prevention of Harassment to investigate

harassment complaints, it is reasonable that it could ask a staff member who is on sick leave to comment upon an IP report if doing so would not exacerbate the illness which occasioned the grant of sick leave and if she or he is fit to do so.

9. The CMO had initially advised that the complainant was medically fit to comment on the IP report. When, in the changing circumstances of the complainant's health, the Administration thought that it was necessary to have further medical opinions on this, Manual paragraph 343.1.24 provided a basis for obtaining them. It permitted the Medical Unit to conduct or authorize and review medical examinations for a purpose related to the complainant's sick leave. That purpose was to determine whether, given the nature of his illness, he was medically fit to comment on the IP report notwithstanding that he was on sick leave. It is noted, for example, that Dr G. was asked to consider the complainant's mental health and capacity to comment on the report and whether providing comments would pose a health risk. In the Tribunal's view, the FAO took reasonable steps to discharge its duty to accord due process to the complainant, as well as its duty of care and its duty to be fair to him, while it sought to discharge its duty to implement its Policy on the Prevention of Harassment.

10. The medical specialists, Dr F.-B. and Dr G., concluded after detailed examinations and analysis that the complainant's health did not prevent him from commenting in writing on the IP report. Following receipt of the reports, neither the CMO nor the Administration erroneously interpreted, ignored or misapplied Dr G.'s report or the diagnosis therein, as the complainant contends. The report by Dr G. does not show that the mandate or the information which he was given by the Administration or by the CMO prejudiced his independent evaluation or conclusions, as the complainant further contends. There is no evidence to support the complainant's assertion that asking him on 2 July 2014 to comment on the IP report before Dr G.'s report was shared with him denied him due process. In the result, the complainant's plea of abuse of authority by the Director of OHR, and by the CMO, is unfounded.

11. The complainant challenges the Director-General's final decision on the basis that the Director-General wrongly accepted the findings of the Appeals Committee, which, in his view, are flawed. The complainant is mistaken. In its report, which the Director-General accepted in its entirety, the Appeals Committee correctly found that Staff Rule 302.6.217 did not apply to permit the FAO to require the complainant to provide responses to the IP report while he was on sick leave. The Appeals Committee nevertheless opined that "the scope of the existing provisions governing sick leave had been interpreted by the Organization based on the need to balance the rights of the [complainant] with the interests to health and well-being of the 19 staff members who filed a complaint of harassment against him". That finding, in effect, accords with the Tribunal's conclusion in consideration 9 of this judgment. There is no evidence, as the complainant contends, for example, that the Appeals Committee discriminated against him and showed partiality and bias; covered up for the FAO; overlooked or disregarded facts; made mistakes of fact; falsified facts, evaded addressing the violations of his rights; made errors of law; failed to provide reasons for its findings; came up with "bogus recommendations"; and failed to declare the referrals to medical experts invalid. These pleas are therefore unfounded.

12. The Tribunal, however, agrees with the complainant that the internal appeal process, which took some twenty-eight months to be completed, was too long. For this, the complainant will be awarded 2,000 euros in moral damages. Since the complainant succeeds in part, he will be awarded 500 euros in costs.

DECISION

For the above reasons,

1. The FAO shall pay the complainant 2,000 euros in moral damages.
2. The FAO shall also pay the complainant 500 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 31 October 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ