Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

D.

v.

IFAD

128th Session **Judgment No. 4140**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms C. D. against the International Fund for Agricultural Development (IFAD) on 27 February 2017 and corrected on 6 March, IFAD's reply of 5 July, corrected on 14 July, the complainant's rejoinder of 25 November 2017 and IFAD's surrejoinder of 14 March 2018;

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

Having examined the written submissions;

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

The complainant challenges the decision to summarily dismiss her for serious misconduct during her probation period.

The complainant joined IFAD on 30 May 2016 under a two-year fixed-term contract. She was assigned to the post of Country Programme Manager in the West and Central Africa Division, and was also IFAD Representative in the Democratic Republic of the Congo and in the Republic of the Congo and Country Office Director in both countries. The confirmation of her appointment was subject to the completion of a 12-month probationary period.

Following an accident at work on 16 October 2016, the complainant was placed on sick leave until 23 October. On 17 October her supervisor, Mr de W., the Director of the Division, informed her that he designated

Mr K. as Officer-in-Charge. By fax messages sent on 18 October, Mr de W. notified the authorities of the Democratic Republic of the Congo and of the Republic of the Congo that Mr K. would take over from the complainant "on a temporary basis with immediate effect". The following day, Mr de W. sent the complainant a draft appraisal of her performance, relating to the first half of her probation period, in which he evaluated her performance as not satisfactory and recommended that her contract should be terminated.

At the end of October, the complainant was required to come to IFAD headquarters, in Rome, to discuss these "recent developments". The meeting took place on 3 November.

Meanwhile, as the competent authorities in the Democratic Republic of the Congo and in the Republic of the Congo had expressed their dissatisfaction with various measures taken by Mr de W. and, in particular, with the appointment of Mr K., the President of IFAD asked the Office of Audit and Oversight to conduct a preliminary investigation. At the end of the investigation, the complainant was notified, by a memorandum of 21 November 2016, of a series of charges of serious misconduct. In particular, she was accused of having breached her duty of loyalty to IFAD by engaging in unauthorised exchanges of correspondence with the authorities of the Democratic Republic of the Congo and of the Republic of the Congo concerning the events that had occurred since 18 October. The complainant was informed that she would be "placed on leave with full pay" from the following day until further notice and was invited to submit her comments, which she did on 23 November. On 30 November, she met with the Director of the Human Resources Division, who handed her a letter informing her that the President had decided to summarily dismiss her for serious misconduct under the relevant provisions of the Staff Rules and the Implementing Procedures. She was informed that this decision was subject to appeal in accordance with the conditions laid down in Chapter 10 of the Human Resources Procedures Manual, as then reproduced in Chapter 9 of the Implementing Procedures.

On 3 December 2016 the complainant sent the President a letter in which she "protest[ed]" against the decision to dismiss her and requested a direct response from him within five working days, failing which she would take the "necessary action to exercise and assert [her] rights". In a letter of 16 December 2016, the Director of the Human Resources Division detailed the amounts that remained to be settled on both sides and reminded her that the applicable provisions governing the internal means of redress had been communicated to her on 30 November 2016. The complainant filed a complaint with the Tribunal on 27 February 2017, impugning what she considered to be an implied decision to reject her "appeal" of 3 December 2016.

In her complaint, the complainant asks the Tribunal, principally, to rule that the decision of 30 November 2016 is null and void and to order her reinstatement as well as the payment of her net monthly salary for the period from 1 December 2016 to the date of her reinstatement. Subsidiarily, she asks the Tribunal to rule that the said decision is unfounded and to order the payment of her salary for the period from 1 December 2016 to 30 May 2018 – the date on which her contract would have expired – as well as the payment of a termination indemnity.

In her rejoinder, the complainant asks the Tribunal, principally, to rule that the decision of 30 November 2016 and the decisions of 18 October and 21 November 2016 are null and void and to order her reinstatement with penalties for delay, as well as the payment of her "salary, allowances and other acquired rights" for the period from 1 December 2016 to the date of her reinstatement. Subsidiarily, she asks the Tribunal to find that these three decisions are unfounded and to order the payment of her "salaries, allowances and other acquired rights" for the period from 1 December 2016 to 30 May 2018, as well as the payment of a termination indemnity.

In any event, the complainant claims moral damages, exemplary damages and costs.

IFAD submits that the complaint is irreceivable for failure to exhaust internal remedies and, subsidiarily, that it is unfounded. It requests the Tribunal to order the complainant to reimburse the sum of 53,576.87 United States dollars that she owes to an IFAD staff credit agency.

CONSIDERATIONS

1. The complainant, who was working as IFAD Representative in the Democratic Republic of the Congo and in the Republic of the Congo and as the organization's Country Office Director in both countries, challenges the lawfulness of the decision of 30 November 2016 to summarily dismiss her for serious misconduct. Having protested against this disciplinary measure to the President of IFAD by a letter of 3 December 2016, she impugns what she considers to be the implied decision to reject that protest resulting from IFAD's failure to reply.

2. The complainant has requested oral hearings. However, in view of the ample and sufficiently clear written submissions and evidence provided by the parties, the Tribunal considers that it is fully informed about the case and, in particular, with regard to the question of receivability, which will be considered below. It does not therefore deem it necessary to grant this request.

3. The defendant raises an objection to the receivability of the complaint based on non-compliance with the requirement set out in Article VII, paragraph 1, of the Statute of the Tribunal, according to which a complaint shall not be receivable unless the person concerned has exhausted such means of redress as are open to staff members of the organization.

4. In the light of the combined provisions of paragraphs 10.6.1, 10.18.4 and 10.22.1 of Chapter 10 of IFAD's former Human Resources Procedures Manual, which is applicable in this case because it is reproduced in Chapter 9 of the Implementing Procedures, any disciplinary measure imposed on a staff member may be challenged, within one month of notification, before the Joint Appeals Board, by means of a statement of appeal addressed to the Secretary of the Board.

Contrary to the view put forward by the complainant, even though the provisions applicable to IFAD staff do not expressly specify this, prior resort to the internal appeal procedure clearly constitutes, under Article VII, paragraph 1, of the Tribunal's Statute, a precondition for the receivability of a complaint.

Moreover, the Tribunal notes that it is plain from paragraph 10.9.1 of the Manual that the means of redress provided for in Chapter 10 thereof are available to former IFAD staff members. The fact that, in this case, the decision to dismiss the complainant took immediate effect did not therefore deprive her of the possibility of appealing to the Joint Appeals Board, which she was therefore required to do in the same manner as a serving staff member.

In addition, the fact that, as the complainant asserts, two members of the Joint Appeals Board could not have been completely impartial in a case concerning her did not in any event exempt her from the requirement to resort to this procedure, as the provisions governing the work of the Board state that its composition is determined on a case-by-case basis and establish mechanisms for disqualification and recusal.

5. The evidence in the file shows that, although the decision of 30 November 2016 indicated expressly that it was subject to appeal in accordance with the provisions laid down in Chapter 10 of the Manual, which, as indicated above, were reproduced in Chapter 9 of the Implementing Procedures, the complainant did not file an appeal in the prescribed manner with the Joint Appeals Board. Instead, she considered that she should take up the matter directly with the President of IFAD by sending him the letter of 3 December 2016 in which she "protest[ed] against the decision of summary dismissal" of which she had been notified and indicated that she looked forward to "receiving a direct response from [him]", adding that "[s]hould [she] not receive any direct response [...] within five working days as of the sending of [this] letter, [she would] take the necessary action to exercise and assert [her] rights".

In a letter of 16 December 2016, the Director of the Human Resources Division informed the complainant, without commenting on the merits of the arguments set out in her letter, that the letter had been forwarded to him and that he "ha[d] been instructed to acknowledge receipt thereof on behalf of the President". In the same letter, apart from providing the complainant with details of the amounts for which she and IFAD remained liable to one another, he merely reiterated the references to the provisions governing the appeal procedure that applied

at the time, pointing out that a copy of those provisions had been forwarded to her on 30 November.

6. Contrary to what the complainant now asserts in her written submissions, the letter of 3 December 2016 cannot be considered as an appeal to the Joint Appeals Board. The complainant did not express any intention to refer the matter to the Board, which was not even mentioned in her letter; furthermore, the request that she made in the letter, to obtain a personal response from the President within a very short period, was clearly incompatible with the course of an appeal procedure before the Board.

According to the Tribunal's case law, an international organization is under an obligation, in view of its duty of care towards its staff, to assist them when they make mistakes in exercising their right of appeal. In particular, if a staff member has mistakenly addressed an appeal to the wrong body, that body is required to forward the appeal to the competent body (see, for example, Judgments 2345, consideration 1, 3423, consideration 9(b), 3754, consideration 11, or 3928, consideration 14).

This case law, which aims at preventing the procedural rules from wrongly becoming a trap for a staff member who misunderstands the procedure for exercising her or his right of appeal, cannot, however, be applied in the present case, where the complainant was not the victim of such a misunderstanding but voluntarily chose, by turning directly to the President and, moreover, by setting a deadline for his reply, to take a step that was outside of the applicable internal appeal procedure. This deliberate intention is clear from the very terms – cited above – of the letter of 3 December 2016, in which the complainant stated, in particular, that in the absence of a direct response from the President within the prescribed time limit, she would "take the necessary action to exercise and assert [her] rights", which shows that the sending of this letter did not, in her mind, form part of the applicable appeals procedure and that she only envisaged possibly resorting to that procedure subsequently, if this preliminary step proved unsuccessful.

IFAD therefore cannot be faulted for not having viewed this letter as an internal appeal and, consequently, for having refrained from forwarding it to the Joint Appeals Board, since it could not in fact have done so without disregarding the intention expressed by the complainant herself not to file such an appeal at that stage.

7. This conclusion is reinforced by the fact that IFAD had carefully referred on two occasions to the provisions setting out the internal appeal procedure, first in the decision of 30 November 2016 and then in the letter of 16 December 2016, which was sent at a date when the time limit for appealing the contested decision was still running, which confirms that the complainant clearly made a conscious decision not to comply with the procedure.

On this issue, the complainant point out that the decision of 30 November 2016 itself did not describe the means of redress and the time limits to be respected, and she contends that, contrary to what is indicated in the letter of 16 December 2016, the relevant provisions on the subject were not given to her on the day on which she was notified of the decision. But these submissions are irrelevant. IFAD's only obligation in this respect was that provided for under paragraph 8.2.6(iv) of Chapter 8 of the Implementing Procedures, according to which a staff member who is subject to a disciplinary measure must be informed in writing of her or his right to appeal against this decision. In this case, a reference to this right was included in the impugned decision. There was no requirement for the author of the decision to include a description of the applicable appeals procedure, bearing in mind that – in the absence of a provision to the contrary and barring very exceptional circumstances – the Tribunal's case law does not make the requirement that internal remedies be exhausted subject to their having been mentioned in the contested decision. Moreover, even if the complainant was not given, at the material time, a copy of the aforementioned provisions governing the appeals procedure, which is contradicted by an affidavit in the file written by the official who gave her those provisions, the reference that was made to them was clearly sufficient to enable the complainant to consult them.

8. None of the other arguments put forward by the complainant in an attempt, nevertheless, to have her complaint declared receivable, can be accepted.

In particular, the complainant clearly cannot rely on the fact that IFAD did not challenge the receivability of her claims before the Joint Appeals Board, given that the dispute was not referred to the Board and that it is precisely because no appeal was made to the Board that the complaint is irreceivable.

Moreover, the fact that IFAD did not act on various appeals that the complainant allegedly filed against the decision of 18 October 2016 provisionally relieving her of her duties, as well as against the decision of 21 November 2016 by which she was notified of the charges made against her, could not in any event exempt the complainant from the obligation to challenge the subsequent decision applying the disputed disciplinary measure in accordance with the required procedure.

The same applies to the fact, also cited by the complainant, that she had not had an opportunity to be heard by IFAD while on mission to headquarters prior to her dismissal.

9. As the Tribunal has often recalled, a staff member may not on her or his own initiative evade the obligation to exhaust internal means of redress prior to lodging a complaint with the Tribunal (see, for example, Judgments 2811, considerations 10 and 11, 3399, consideration 4, 3706, consideration 3, or 4056, consideration 5). A complainant cannot, in particular, claim to have respected this obligation simply because she or he has – as the complainant sought to do, in this case, by means of her letter of 3 December 2016 – sent an ultimatum to the decision-making authority to no avail (see Judgments 3302, consideration 4, or 3554, consideration 8).

10. IFAD is therefore right in stating that, having not been the subject of a valid internal appeal, the decision of 30 November 2016 is not a final decision within the meaning of Article VII, paragraph 1, of the Statute of the Tribunal and that the complainant is not, accordingly, entitled to challenge it before the Tribunal. Moreover, since the letter of 3 December 2016 cannot be considered to constitute an internal

appeal, the complainant cannot contend that the absence of a decision taken within the following 60 days gave rise, in accordance with Article VII, paragraph 3, of the Statute, to an implied rejection that can be impugned before the Tribunal.

11. It follows from the foregoing that the complaint must be rejected as irreceivable in its entirety.

12. IFAD asks the Tribunal to order the complainant to reimburse the sum of 53,576.87 United States dollars which, according to IFAD, she owes to a credit agency offering its services to the staff of the organization. However, insofar as this counterclaim is not aimed at compensating IFAD for a damage arising out of the present proceedings as such, it must in any case be rejected as irreceivable as a consequence of the irreceivability of the complaint itself.

DECISION

For the above reasons,

The complaint is dismissed, as is IFAD's counterclaim.

In witness of this judgment, adopted on 3 May 2019, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ