

S. (Nos. 2 and 3)

v.

FAO

(Application for execution)

132nd Session

Judgment No. 4410

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 4065 filed by Mr H. S. on 22 December 2020 and the reply of the Food and Agriculture Organization of the United Nations (FAO) dated 24 March 2021;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. Judgment 4065 was delivered in public on 6 February 2019. It concerned two complaints in which the complainant challenged the decision of the FAO, communicated to him by memorandum dated 17 September 2014, to dismiss him with immediate effect for misconduct. The Tribunal made the following orders in the decision in Judgment 4065:

- “1. The impugned decisions of 20 April and 29 May 2017 are set aside, as is the initial decision of 17 September 2014 to dismiss the complainant.
2. The matter is remitted to the FAO in accordance with consideration 8 [of the judgment].
3. The FAO shall pay the complainant moral damages in the sum of 12,000 euros.
4. It shall also pay him 1,000 euros in costs.
5. All other claims are dismissed.”

2. Consideration 8, which is referred to in point 2 of this decision, relevantly states as follows:

“Manual paragraph 330.3.26 relevantly states that ‘[i]f a reply is received, the initiating officer [...] discusses it with the staff member and any other officer directly concerned (see para. 330.1.4). He/she then forwards it, together with comments to the Director, [Human Resources Management Division] AFH [...]’. Manual paragraph 330.3.27 relevantly provides that ‘[t]he Director, AFH [...] may discuss the matter further with the staff member and the initiating officer’. It is observed that in the email to the complainant of 12 September 2014 the Assistant Director-General ad interim [Corporate Services] informed the complainant, among other things, that the discussion pursuant to Manual paragraph 330.3.26 was not mandatory. He repeated this in his email of 25 September 2014 in response to Ms W. [...] This was mistaken as the discussion under Manual paragraph 330.3.26 is mandatory because of the language of that provision, which is in contradistinction to the language contained in Manual paragraph 330.3.27. Moreover, it was intended to confer a right on the complainant to complete his defence orally in a discussion with the officer who initiated the disciplinary procedure.”

3. It is unnecessary to repeat the background facts as they are sufficiently set out in Judgment 4065, save to recall that the FAO subsequently applied for the interpretation of Judgment 4065 (specifically point 2 of the decision in that judgment) and the Tribunal considered that application in Judgment 4292, delivered in public on 24 July 2020. The Tribunal dismissed as irreceivable the FAO’s application for the interpretation of point 2 of the decision in Judgment 4065 on the basis that consideration 8 of that judgment is clear and unambiguous as in it, the Tribunal had, in effect, determined that the disciplinary procedure was lawful up until the time that the reply was submitted but then there was a material flaw, which warranted setting aside the impugned decision. This, the Tribunal further stated, was because the Administration mistakenly decided that the discussion between the initiating officer and the complainant, pursuant to Manual paragraph 330.3.26, was not mandatory. The Tribunal recalled its further statement, in consideration 8 of Judgment 4065, that Manual paragraph 330.3.26 was intended to confer a right on the complainant to complete his defence orally in a discussion with the officer who initiated the disciplinary procedure. The case was remitted to the FAO to complete the process by complying with the discussion mandated in Manual paragraph 330.3.26 and then to continue the process in accordance with the following paragraphs as relevant. The Tribunal reiterated that both the FAO and the complainant

must approach the implementation of its order in point 2 and the analysis contained in consideration 8 of Judgment 4065 in a rational, sensible and balanced way, and, as a paramount consideration, do so lawfully.

4. In his application for execution, the complainant refers to various written exchanges between the parties subsequent to the delivery of Judgment 4065 with a view to organising the discussion foreseen by Manual paragraph 330.3.26. That process has been unsuccessful to date, and, in any event, does not engage the Tribunal.

5. Noteworthy, the pleadings of the parties in the present proceedings show that they still hold differing views as to what should be done as the next step to complete the process by complying with the discussion mandated in Manual paragraph 330.3.26. This does not provide a basis for the Tribunal to entertain an application for the execution of Judgment 4065. Neither is it a basis on which the Tribunal would make the following orders, which the complainant seeks: to declare that the subject disciplinary process as a whole has become unlawful and to rescind the disciplinary measure contained in the correspondence dated 17 September 2014; alternatively, to order the complainant's reinstatement in the FAO retroactively from 17 September 2014 until he reached the mandatory retirement age and to order the FAO to pay him an amount equivalent to 22 months' salary plus interest and all benefits, including the FAO's contribution to the pension fund, medical insurance and GLADI (the Group Life, Accident and Disability Insurance); to pay him moral damages for the FAO's delay in taking any action following the delivery of Judgment 4292; costs and all the other claims which he sought in his second and third complaints. To the extent that any of these orders are within the Tribunal's competence, they may only be issued on the merits of underlying claims, which cannot be considered under an application for execution as it is not open to the Tribunal, when examining an application for execution, to modify the content of the provisions of the judgment in respect of which the application is made (Judgment 4093, consideration 9).

6. The FAO states that it "would welcome any guidance that the Tribunal may consider appropriate to provide, given its continuing inability to complete the execution of Judgment 4065 due to the complainant's refusal to hold a discussion as ordered in the Judgment". First, the Tribunal

recalls its reminder in consideration 8 of Judgment 4292, that the parties must approach the implementation of its order in point 2 and its analysis in consideration 8 of Judgment 4065 in a rational and sensible way, and, as a paramount consideration, to do so lawfully. In the second place, the Tribunal recalls that in Judgment 4065 it ordered the parties to meet so that the complainant can complete the defence orally. Judgment 4292 confirmed this. To execute this obligation, both parties must comply with it. As the complainant continually refuses to attend such a meeting because he wants something else which does not arise from Judgment 4065 its execution is being made impossible (see, inter alia, Judgments 3261, consideration 16, and 3824, consideration 4). In the Tribunal's view, the FAO has, by inviting the complainant to meet, done its part in an attempt to organise the discussion foreseen by Manual paragraph 330.3.26. The complainant failed to cooperate. There is nothing else the FAO can do to organise a meeting and the judgment is deemed executed.

7. In the foregoing premises, the application for execution will be dismissed.

DECISION

For the above reasons,

The application for execution is dismissed.

In witness of this judgment, adopted on 28 May 2021, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2021 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ