

**M. (No. 2)**

**v.**

**FAO**

**136th Session**

**Judgment No. 4691**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr A. M. against the Food and Agriculture Organization of the United Nations (FAO) on 16 August 2019 and corrected on 19 September, the FAO's reply of 16 December 2019, the complainant's rejoinder of 9 April 2020 and the FAO's surrejoinder of 20 July 2020;

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 close his complaint of harassment and abuse of authority.

The complainant joined the FAO in July 1995. From 1 January 2015 to 9 September 2016, he held the position of Director of the Liaison Office for North America (LOW), at grade D-1.

On 21 March 2016, the complainant delivered a presentation on his view and future strategy for the LOW Office at a conference and was thereafter concerned about the lack of understanding and disagreement of certain representatives of Member States regarding priorities in the LOW work programme. Shortly after, on 28 March 2016, he conveyed these concerns to the Deputy Director-General, Operations (DDO) by email, seeking urgent feedback and guidance.

On 25 April 2016, the complainant was informed by phone by the Director, Office of Support to Decentralized Offices (OSD), that he would be transferred from his post in Washington, DC, United States of America, to Haiti. On 2 May 2016, he sought advice by email from the DDO on the proposed transfer, suggesting alternative vacant or imminently vacant D-1 posts as against Haiti, which he viewed as incompatible with the serious medical issues he was facing. Subsequently, the Chief Medical Officer recommended against the transfer to Haiti due to the complainant's medical condition.

During the months that followed, several other transfers were proposed, to which the complainant also objected on medical grounds.

On 22 February 2017, the complainant received an email from the Director of the Office of Human Resources (OHR) informing him of his transfer to Budapest, Hungary, as Senior Policy Officer, at grade D-1. The Director indicated that this post was commensurate with the complainant's professional qualifications, and that the Terms of Reference would be provided to him "in due course". The complainant was invited to submit any observations on the proposed transfer on the following day. On 27 February, he enquired from the Director of OHR as to the number of days' notice usually allocated for a transfer and change of duty station in order to make the required arrangements. He mentioned the unnecessary costs that he had incurred, such as the force majeure compensation he had to pay on a cancelled car lease, and payment of a lump sum for shipment of his household effects from Washington, DC, to Budapest, requesting reimbursement. While these financial claims were rejected, exceptional approval was given for storage costs for his personal effects and the daily subsistence allowance (DSA) payments for his stay in Washington, DC, pending his move to the new duty station. On 11 March 2017, the complainant travelled to Budapest.

On 15 May 2017, the complainant submitted a complaint of harassment and abuse of authority against the DDO and the Director, OSD, to the Office of the Inspector General (OIG).

On 27 October 2017, the OIG issued a Notice of Closure after a preliminary review and dismissed the complaint in its entirety as being without merit. The Notice of Closure addressed several allegations

made by the complainant, including abuse of authority by the DDO in expressly instructing the complainant “to abide and succumb to” the pressures exercised by representatives of Member States, contrary to the Standards of Conduct for the International Civil Service, abruptly removing him from his position as Director of FAO LOW, ordering him to move to South Africa, with no clear explanation or due process, and, with all of these instructions carried out by the Director, OSD.

The complainant lodged an appeal with the Director-General on 15 December 2017, contesting the flawed findings and conclusions of the OIG investigation. This appeal was rejected on 13 February 2018.

On 19 February 2018, the complainant then lodged an appeal with the Appeals Committee. The Appeals Committee’s report of 17 December 2018 found the appeal to be receivable and, on the merits, acknowledged the complexity of the appeal as it was linked to the transfer of the complainant to the FAO Regional Office for Europe (REU), which the Committee noted it had previously reviewed. To avoid potential overlap, the Committee limited its deliberations to facts not previously discussed in the prior transfer case. It considered that the time taken by the OIG to review the complaint was excessive but found no formal or substantial grounds that the OIG’s decision was biased or wrong, and also found that the OIG had acted in conformity of its mandate in not commissioning an external investigation as the complainant had demanded. On the merits, the Committee found that the OIG had considered all the information in determining whether the “behaviour described” in the complaint met the criteria for harassment and abuse of authority, on the basis of which it recommended that the appeal be dismissed in its entirety.

The Director-General, in his final decision of 20 May 2019, endorsed and adopted the Committee’s above findings, and decided not to set aside the challenged decision, and to dismiss the complainant’s claims. However, the Director-General disagreed with the Committee’s findings on the duration of the preliminary review, which he viewed as appropriate considering the nature and complexity of the complaint. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to declare null and void the preliminary review and Notice of Closure pertaining to the original complaint of harassment and abuse of authority. He seeks moral damages, including for negligence and excessive delay in the internal appeal process in the amount of 300,000 euros, as well as compensation for material damages he suffered due to interruption in career advancement in the amount of 200,000 euros. In addition, he claims exemplary damages in the amount of 250,000 euros, reimbursement of all legal fees in an amount of not less than 15,000 Swiss francs, and interest on all amounts awarded at the rate of 5 per cent per annum from 20 May 2019 and 30 March 2018 through the date all such amounts are paid. Lastly, he seeks such other relief as the Tribunal deems necessary, just and fair.

The FAO asks the Tribunal to dismiss the complaint as devoid of merit, concluding that the complainant has entirely failed to discharge his burden of proof in respect of any of his claims of harassment and abuse of authority. In addition, the FAO asks the Tribunal to dismiss as irreceivable the complainant's request for exemplary damages (which he had not raised in his internal appeal), as well as a medical certificate dated 6 April 2020 provided only in the rejoinder to support his claim for the award of moral damages.

#### CONSIDERATIONS

1. At relevant times, the complainant was an official of the FAO. He has filed a number of complaints with this Tribunal, some of which are addressed in judgments given this session. This particular complaint was filed on 16 August 2019. The subject matter of the complaint is a decision of the Office of the Inspector General (OIG) to close a case arising from a complaint of harassment and abuse of authority made by the complainant on 15 May 2017. The closure decision was communicated to the complainant on 27 October 2017. The complainant thereupon lodged an internal appeal. In a report of 14 December 2018, the Appeals Committee recommended that the appeal be dismissed, as it was by a

decision of the Director-General of 20 May 2019. That last-mentioned decision is impugned in these proceedings.

2. The complainant has requested an oral hearing. However, the written pleadings and the documents produced by the parties are sufficiently detailed to enable the Tribunal to determine the issues raised in these proceedings. It is therefore unnecessary to grant this request.

3. The complainant's pleas in his brief are advanced under several headings. The first general heading is that the impugned decision was unlawful and "tainted by derogation of rules". Under that general heading are a number of subheadings. The first subheading is the derogation of rules on procedural fairness and impartiality, the second is the derogation of rules on transparent, expedient and thorough investigation and the third concerns the burden of proof and the adversarial principle. The second general heading is that the impugned decision was tainted by manifest mistakes of fact – including a failure to investigate facts – and 18 instances are listed. The third general heading is that the impugned decision is tainted by errors of law and contains two subheadings, one identified the applicable law and the other the application of the law or its non-application to the "instant case". Under that second subheading, four matters are identified including "fatal errors of law of individual claims in the [Notice of Closure]". 12 such errors are identified. The fourth general heading is that the preceding pleas clearly demonstrate harassment and abuse of authority on the part of the "[r]espondents". The fifth and final general heading is that the complainant is entitled to moral damages firstly as a result of the illegality of the impugned decision and secondly as a result of the excessive delay in the internal appeal process.

4. It is convenient to commence by focusing on the role of the OIG in the investigation process. It is governed by an Administrative Circular of 15 February 2017 which promulgated revised "Guidelines for Internal Administrative Investigations by the Office of the Inspector-General" (the Guidelines). Relevantly, the Guidelines identify three

phases of an investigation. The first concerns the receipt of the complaint. The second concerns a preliminary review which, as happened in this case, can result in the closure of the case. That occurs when the OIG concludes that a complaint does not warrant an investigation (paragraph 23 of the Guidelines). The third is a full investigation. That occurs when the OIG determines, on the basis of the preliminary review, that there are reasonable grounds to believe that a member of the FAO personnel has engaged in unsatisfactory conduct. This triggers the initiation of a full investigation (paragraph 28 of the Guidelines). The Guidelines provide that a preliminary review generally includes an “interview of the complainant” and a review of the documents submitted by the complainant together with any investigative steps necessary to determine whether a full investigation is warranted (paragraph 21 of the Guidelines). During the preliminary review, the potential subject of the investigation is not notified of either the decision to initiate a preliminary review or of the allegations involved, at least ordinarily (paragraph 22 of the Guidelines). There is also a requirement that if the case is closed at the completion of the preliminary review, the reasons for this decision will be documented in the OIG’s internal files (paragraph 26 of the Guidelines). What is important to note from the foregoing is that the manner in which the investigation proceeds is substantially determined by an assessment made by the OIG of the course it should take, though doubtless it needs to act reasonably and rationally. Indeed paragraph 3 of the Guidelines identifies, as an objective, that allegations of unsatisfactory conduct are investigated thoroughly and impartially. It should also be noted that the FAO’s policy on the prevention of harassment defines abuse of authority as the improper use of a position of influence, power or authority against another person.

5. The complainant’s pleas in his brief are a discursive mixture of alleged flaws in the OIG decision to close the case, the allegedly flawed approach of the Appeals Committee and the allegedly flawed approach of the Director-General in the impugned decision. In large measure the pleas proceed on the premise that the complainant’s account of the facts and how they should be viewed is uncontrovertibly

correct. However, and notwithstanding, there is one demonstrable flaw in the approach of the OIG.

6. The OIG commenced its notification of case closure dated 27 October 2017, by identifying what were the allegations of harassment, abuse of authority and retribution arising from the complainant's complaint of 15 May 2017. It said:

"I am writing to inform you that the Office of the Inspector General's Investigations Unit (OIG) has completed its preliminary review into the allegations of harassment, abuse of authority and retribution received by our Office on 15 May 2017 - **namely** that Mr [G.], then Deputy Director-General (DDO) (Operations), abused his power by instructing you to participate in certain actions which you felt contravened the Organization's rules and regulations. Furthermore, in response to your objection to participating in these actions, Mr [G.] and Mr [R.D.L.P.], Director of the Office of Support to Decentralization (OSD), abused their authority in retribution against you by abruptly removing you from your position as Director, LOW, with the 'singular purpose of professionally and publicly humiliating' you and subjugating you to 'detrimental and demeaning actions' which culminated in an 'unlawful demotion'." (Emphasis added.)

7. The use of the word "namely" signifies an elucidation of what precedes it. That is to say, what followed was an elucidation of the allegations of harassment, abuse of authority and retribution. The above description certainly encapsulates some of what the complainant had said in his complaint of 15 May 2017. The description made, as the centrepiece of the harassing conduct and abuse of authority, the instructing of the complainant to "participate in certain actions", and imposing retribution for him failing to do so. But the complainant's allegation of abuse of authority travelled well beyond what was summarised in the preceding passage. The abuse of authority, as alleged, involved "instructing [not the instructing of the complainant just referred to] unlawful transfers and actions as well as the allegedly unlawful demotion". Moreover, the instructing of the complainant, as alleged, occurred in June 2016 but the protracted period of harassment commenced, on the complainant's account in his complaint of 15 May 2017, in March 2016 not in June 2016. In his complaint, the complainant recounted having received no feedback or guidance from Mr G.

(following a meeting with, among others, the United States Ambassador to the Rome-based United Nations Agencies) in late March 2016 to issues he had raised which constituted, in the complainant's view, a gross breach of standards. He also gave a detailed account of a proposed transfer to Haiti which he had been informed about by Mr R.D.L.P. in May 2016 and in respect of which he, the complainant, corresponded with Mr G. He also referred to correspondence with Mr G. in May 2016 about possible lateral transfers which in due course manifested, in the complainant's assessment, in an *a priori* decision (by Mr G.) before "due and transparent consideration based foremost on considering in service staff of longstanding and merit explicitly stated in relevant FAO policies".

8. It is true that after the passage set out in consideration 6 above in the notification of case closure, the OIG addressed a number of specific issues or events, effectively in isolation, including two which happened before June 2016, namely the proposed transfer to Haiti and the question of lateral transfers.

9. It is convenient, for present purposes, to focus on the events before June 2016. In relation to the proposed transfer of the complainant to Haiti, the OIG said, in its case closure decision, that it "was unable to identify any information supporting the claim that [Mr G.] or [Mr R.D.L.P.] proposed [the complainant's] transfer to Haiti therefore [the] OIG finds this allegation unsubstantiated". But this conclusion completely discounts evidence from the complainant in his complaint of 15 May 2017 about a phone call with Mr R.D.L.P. on 25 April 2016 in which the complainant was told he would be transferred to Haiti with immediate effect and an email from the complainant of 2 May 2016 to Mr G. (included in the material provided to the OIG in support of the complaint of 15 May 2017) in which the complainant and Mr G. discuss the transfer and refer to a conversation between Mr R.D.L.P. and the complainant about the possible transfer of the complainant to Haiti.

10. In relation to the lateral transfers, the OIG recounted the legal framework for lateral transfers (a matter for decision by the Director-General) and then said “[the] OIG was unable to identify any indications that Mr G. or Mr R.D.L.P. made, or unduly influenced, the decision on the location of your transfer. Therefore, [the] OIG finds this matter unsubstantiated”. But this legalistic approach together with the use of the expression “**unduly** influenced” (emphasis added) substantially discounts the possibility that Mr G. did in fact influence decisions not to transfer the complainant laterally. Indeed, in the email of 2 May 2016 referred to in the preceding consideration, the complainant identified three posts to which he could be laterally transferred and asked Mr G. to “please consider and discuss the following alternatives with the [Director-General]”. In a responsive email of 4 May 2016, Mr G. indicated that he would be “happy to raise the options with the [Director-General]”. While it can be readily accepted that this material is potentially entirely consistent with there not having been an abuse of authority, it was relevant to the complainant’s thesis that there had been. That thesis could not be rejected on the simplistic grounds it was. These matters of detail discussed in this consideration, and the preceding one, raise doubts about the thoroughness of the analysis by the OIG of the material it had more generally.

11. But the more important point is that by framing the alleged harassing conduct involving an abuse of authority in the narrow way it did as discussed in consideration 6 above, together with its consideration of specific issues or events in isolation, it is more likely than not that the OIG failed to consider whether the conduct as a whole involved an abuse of authority (see Judgment 2930, consideration 3) or, putting it slightly differently, whether the cumulative effect of the conduct could be reviewed as harassment and, specifically, an abuse of authority (see Judgment 4347, consideration 30). It is really no answer to say, as the FAO does in its surrejoinder, that the OIG stated in the conclusion to the Notice of Closure “each allegation of harassment, abuse of authority and retribution [...] [was] either unfounded or unsubstantiated” and that “consequently the behaviour presented in [the] complaint does not meet the criteria for harassment”. Indeed, this observation reinforces the

view that the OIG's consideration was of each allegation rather than, potentially, all the allegations considered together.

12. This is a sufficient basis to set aside the Notice of Closure of 27 October 2017 as sought by the complainant. The impugned decision dismissing the complainant's appeal should also be set aside. Importantly, the complainant does not seek an order that the OIG again undertake a preliminary review and, if satisfied the complaint should proceed to the third phase as discussed earlier, undertake a full investigation. It is important because that would be the appropriate mechanism for the investigation of his allegations that he had been the subject of gross harassment and abuse of authority. The complainant invites the Tribunal to determine that he had been the subject of gross harassment and abuse of authority and seemingly on that footing, order moral damages in the sum of 300,000 euros and material damages in the sum of 200,000 euros as well as 250,000 euros exemplary damages. The course proposed by the complainant travels well beyond the subject matter of this complaint.

13. Nonetheless the complainant is entitled to moral damages for the moral injury he undoubtedly suffered as a result of the unlawful peremptory rejection of his complaint of harassment and particularly, abuse of authority and retribution about which, at this time, he obviously felt extremely strongly. The Tribunal assesses those damages in the sum of 60,000 euros.

14. The complainant also seeks moral damages for the time it took to resolve his internal appeal though he adds, in his rejoinder, a claim concerning the alleged delay in the consideration of his complaint by the OIG. Having regard to the subject matter of the appeal – and the complaint to the OIG – and the detailed factual matters advanced by the complainant, the time taken on either count was not excessive.

15. The complainant is entitled to an order for costs, which are assessed in the sum of 8,000 euros.

DECISION

For the above reasons,

1. The impugned decision of 20 May 2019 dismissing the complainant's appeal is set aside.
2. The FAO shall pay the complainant 60,000 euros moral damages.
3. The FAO shall also pay him 8,000 euros costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 18 May 2023, Mr Michael F. Moore, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ