

NINETY-NINTH SESSION

Judgment No. 2470

The Administrative Tribunal,

Considering the complaint filed by Ms M.I. against the Food and Agriculture Organization of the United Nations (FAO) on 5 December 2003 and corrected on 7 April 2004, the FAO's reply of 27 July, the complainant's rejoinder of 23 November 2004 and the Organization's surrejoinder of 2 February 2005;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant is a Japanese national born in 1951. She was seconded to the FAO from the United Nations Development Programme for a two-year period as from 1 June 1999. At the material time she held grade D-1.

In the context of an overall review of the FAO's rental subsidy scheme, the Office of the Inspector-General investigated rental subsidy claims made by the complainant between June 1999 and March 2000. In its report AUD 4400, entitled "Special Review of Rental Subsidy" and transmitted to the Director-General on 28 September 2000, the Office of the Inspector-General found that the complainant's claims were based on a lease for the same apartment as that of a staff member of the International Fund for Agricultural Development (IFAD), the complainant's partner. It recommended that the FAO should recover the amounts of the rental subsidy unduly paid to the complainant between 1 June 1999 and 31 March 2000. The report noted that the complainant had already reimbursed the amount of a subsidy paid in connection with an alleged rental agency fee.

In December 2000 the Office of the Inspector-General issued a note to the Director-General on "Developments since issuance of Report AUD 4400", concerning investigations made into the alleged payment of the rental agency fee. It reported that the complainant had submitted, as proof of payment, "a very poor photocopy" of a cheque she had obtained from her bank; steps taken to ascertain the propriety of this document as proof of payment revealed that the complainant had tampered with the copy of the cheque. These findings were brought to the attention of the Chief of the Management Support Service who, by a memorandum of 16 February 2001, advised the complainant that the investigations had revealed "several instances of unsatisfactory conduct, which appear[ed] to be incompatible with [her] obligations as a senior staff member of the Organization"; she was charged with unsatisfactory conduct as defined in the FAO Administrative Manual under Section 330 concerning disciplinary measures. She was also notified therein that it would be recommended to the Director-General that she be dismissed for misconduct. A series of meetings and correspondence ensued between the complainant and the Administration; following one such meeting, on 6 April 2001, the Chief of the Management Support Service wrote a report summarising his meeting with the complainant.

On 3 May the complainant informed the Assistant Director-General in charge of the Technical Cooperation Department that she would return to the service of the United Nations (UN) at the end of her two-year secondment. In a memorandum of 18 May the Director of the Personnel Division informed the complainant that two instances of misconduct on her part had been established: that she had claimed a rental subsidy for refurbishing costs that had been disguised as normal rental payments and that she had admitted to falsifying the photocopy of the cheque she had given to the auditors as evidence of payment of a rental agency fee. She was further informed that, given the fact that she was returning to the UN at the end of the month, the Director-General of the FAO had decided that "the purpose of protecting the Organization by way of disciplinary action was no longer at issue" but that, nevertheless, the instances of misconduct should be reported to the UN in accordance with the procedure set out in paragraph 7 of the "Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff" and that she should reimburse the amounts unduly claimed and paid to her as rental subsidy. The Director of the Personnel Division faxed the UN a document, dated 24 May 2001, headed "Administrative Details", to inform that organisation, among other things, of the instances of misconduct. This correspondence was copied to the complainant. The complainant reimbursed the sums on 29 May; the UN was informed of this by a fax of 31 May

2001.

In a letter of 10 August 2001 the complainant appealed to the Director-General of the FAO against the findings of the Office of the Inspector-General and the Organization's charge of misconduct; she argued that the FAO took "unreasonable and improper administrative actions" when it provided the UN with information concerning her misconduct at the FAO. The Assistant Director-General in charge of Administration and Finance Department dismissed this appeal in a letter of 9 October 2001. She appealed against this decision to the Appeals Committee on 24 December 2001; her appeal was not heard until 22 May 2003, in order to meet her request to be present. In its report dated 13 June 2003 the Committee considered her claims and contentions to be unfounded; it recommended rejecting her appeal. The Director-General did so in a letter of 25 August 2003, which the complainant impugns.

B. The complainant submits that in the spring of 1999 she and her partner, a senior staff member at IFAD, rented two contiguous apartments for which they each executed separate leases. She claimed the rental subsidy for her apartment and for the rental agency fee, but when she realised, in March 2000, that the rental agency fee (which she had given directly to her landlord) had not been paid by her landlord to the rental agency, but instead to its employee in his personal capacity, she withdrew her claim for a subsidy with respect to the fee and voluntarily reimbursed the FAO for it. She and her partner married in April 2000 and her rental subsidy entitlement therefore ceased. Before she left the FAO and returned to the UN she repaid the full amount of the rental subsidy that she had received.

She argues that the Appeals Committee made erroneous conclusions in its report. For instance, it had concluded that the apartment, which had been two separate units in the past, had become one unit. She says that this conclusion "is unproven and irrelevant". The complainant contends that what is important is that there were two units at the time she and her partner rented them. The FAO auditors carried out an "incomplete" visit of the premises, and it is on this basis that the Appeals Committee wrongly concluded that there was only one apartment. She submits that the previous owner of the apartment has confirmed, as does the copy of the land registration document of 21 June 1999 from the Land Registry Office, that there were two apartment units at the time the leases were concluded. She was never advised of an updated registration reflecting only one apartment until it was produced by the FAO Administration during the last stage of her appeal. The Appeals Committee cited discrepancies in the descriptions of the two leases as evidence of impropriety; she contends that information should have been obtained from the landlord, but the auditors failed to meet with him.

The procedures used by the Office of the Inspector-General were improper. Its report is based almost entirely on statements attributed to the complainant and her husband with no written records; the alleged statements cannot be authenticated and this prejudices her right to defend herself. Also, it obtained a copy of the cancelled cheque for the agency fee from her bank in violation of Italian privacy law. The Appeals Committee refused to take this fact into account. The complainant explains that she had modified the photocopy of the cheque so as to reflect to whom the money had been given. There was no intent to defraud the FAO, because she had already reimbursed the Organization for the subsidy it had paid on the agency fee. She considers that the Office of the Inspector-General, having been presented with proof that she had properly paid her rent, was "seeking another means to fabricate allegations against her". She notes that the FAO rental subsidy instruction does not mention that renovation costs are excluded from rent. The complainant contends that she fulfilled all the requirements to receive a rental subsidy under the rules in force. She provided, in particular, a duly executed lease and confirmation that all payments were received by the landlord. According to her, she was "properly certified" to receive the rental subsidy under the rules in force.

She argues that "an organisation has the obligation to present a *prima facie* case of misconduct when it bases its administrative action on such allegations". There must be sufficient evidence to support its findings, and not conflicting or contradictory information as in her case. The "only certification" made by her was that she made monthly rental payments and that she had paid a one-month rental agency fee. There was no falsification of these claims and no documentation was submitted to justify a false claim. Not only was the Appeals Committee biased, but they implied that she should have been held to a different standard of conduct because of her "high standing". She had relied entirely on the advice of the FAO Administration in considering that she qualified for the subsidy, and was therefore able to apply for it. She says that it would not have been known that she had altered the cheque if the Office of the Inspector-General had not improperly obtained a copy of it from the bank. In the "absence of proof of fraud" the imposition of disciplinary measures was unwarranted, and reporting the misconduct to the UN was unjustified. This irreparably harmed her professional reputation and calls for compensation.

She asks the Tribunal: to quash the Director-General's decision rejecting her appeal; to rectify her record of service, including the information forwarded to the UN; to repay the amount due to her under the rental subsidy scheme; to award her two years' salary in material damages, an additional 50,000 United States dollars in moral damages, and 20,000 dollars in costs and expenses.

C. In its reply the FAO points out a contradiction in the complainant's arguments. On the one hand, she said there were two separate leases with respect to two distinct apartments and, on the other hand, she argues that there was nothing wrong in using the rental subsidy scheme as a tool to have refurbishing costs reimbursed by the Organization. She had admitted, during the meeting of 6 April 2001, that the purpose of her "lease" was to pay for the refurbishing of the apartment rented by her partner and argues that there is nothing in the FAO Administrative Manual that prohibits her from claiming a subsidy on it. However, she later submitted a statement dated 18 October 2001 from her landlord which, she alleges, "confirm(ed) that the payment was exclusively made for the rent and not for any other purposes".

The fact that the complainant had reimbursed the Organization during the investigations did not mitigate the gravity of her other actions. She misused the rental subsidy scheme by making overlapping claims with her partner and by using it to reimburse the landlord's refurbishing costs. The FAO asserts that the rental subsidy scheme is not intended to reimburse such costs. The relevant provisions of the Administrative Manual do not leave the issue open to interpretation. While it admits that the level of rent set for an apartment might take into account a landlord's increased expenses due to refurbishing, this does not mean that the rental subsidy scheme may be used to refurbish an apartment.

The Organization contends that the complainant claimed a subsidy on the rental agency fee which she had never paid and falsified a document with a view to misleading the investigators. The fact that she reimbursed this sum to the FAO in the course of the investigation does not change the instance of unsatisfactory conduct on her part. It cannot accept her argument that the reimbursement of the sums received makes the fraud disappear. While it is true that the Organization initially obtained a copy of the cheque from the bank on a confidential basis, it has been able to substantiate the forgery by other, independent, means. The information on the basis of which it could bring such a charge had been obtained with the complainant's consent and is admissible.

The FAO submits that in reporting the complainant's unsatisfactory conduct to the UN it acted in strict conformity with the provisions of paragraph 7(a)(vi) of the Inter-Organization Agreement and it did not breach any applicable principle of law. It also submits that providing the information, which was factually correct, to the UN did not violate any other applicable procedure or relevant principle of law.

D. In her rejoinder the complainant argues that the Organization's reply "repeats the same mistake" as that made by the FAO Appeals Committee, which is to say that it treats the case as a review of the disciplinary charges. But her internal appeal was against the administrative decision to recover the amount of the rental subsidy and to report the matter to the UN without giving her the opportunity to defend herself against "the newly modified allegations". The FAO has based many of its allegations on the report of the meeting held on 6 April 2001 but she had not previously been shown that document, which breaches her right to due process.

She maintains that the rental subsidy scheme only requires a valid lease and proof of rent payment and that she provided all the required documentation. Furthermore, the information given to the UN was not provided to her at the same time, as required by the statutory provisions; this created an unfair situation. In addition, having informed the UN of the allegations against her the FAO had an obligation to cooperate with the UN Joint Disciplinary Committee; it failed to do so.

E. In its surrejoinder the FAO notes that in late July 2004 the United Nations Administrative Tribunal handed down Judgement No. 1175 on a case filed by the complainant. That Tribunal upheld a demotion imposed upon her by the UN as a disciplinary measure for her misconduct while she was seconded to the FAO; it also stated that dismissal would have been considered a disciplinary measure proportional to the misconduct. The FAO expresses its "surprise" that the complainant made no mention of that judgment in her rejoinder.

It contends that the administrative decision taken in her regard was directly related to her misconduct and is, therefore, central to the complaint. It submits that she received copies of all information sent to the UN concerning her. In addition, she had been advised, before any information was transmitted to the UN, that the FAO was going to do so. The defendant asserts that the report of the meeting in April 2001 was not the source of the main

allegations made by the Organization, and that by contesting it the complainant is trying to disqualify the whole procedure it followed. The document, however, adds nothing substantive that had not already been arrived at during the course of the investigations and disciplinary proceedings. It otherwise maintains its position.

CONSIDERATIONS

1. The complainant is a staff member of the United Nations who, at the material time, was seconded to the FAO. The FAO Personnel Division notified her on 19 February 2001 that a disciplinary measure of dismissal for misconduct was being considered against her. On 3 May 2001 the complainant informed the FAO that she would be returning to the service of the UN at the end of her secondment, on 31 May 2001; on that basis it was decided to take no disciplinary action against her but to inform the UN of the entire matter. Later on, however, partially duplicated proceedings took place in both international bodies, in essence concerning the same facts.
2. The FAO submitted a statement of “Administrative Details” concerning the complainant, dated 24 May 2001, to the UN, as required in paragraph 7(a) of the “Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances”. According to this agreement, such a statement must include “an appraisal of the performance and conduct of the staff member during secondment”. The complainant questions this transfer of information by way of the said statement, but the above-mentioned rule is clear and reasonable, and has been applied fairly by the Organization.
3. The complainant affirms that on 28 May 2001 she was informed through “informal” channels that the UN was to put her on suspension from duty. On 29 May she returned the rental subsidy which the FAO claimed that she had improperly received. On 1 June she returned to the service of the UN, where on 4 June 2001 she was suspended from duty. On 25 June 2002 she was demoted two grades, on the grounds specified by the FAO in its statement of 24 May 2001, and on her own admission of forging a cheque.
4. On 24 December 2001 the complainant filed an internal appeal before the FAO Appeals Committee arguing that it should not have sent the statement of 24 May 2001 to the UN. On 15 August 2002 she filed an Application before the UN Administrative Tribunal against her demotion to P-4 level.
5. The FAO’s Appeals Committee in its report of 13 June 2003 concluded that all her claims for relief failed; it was aware that the challenged decision was also part of the disciplinary proceedings initiated within the UN. The Director-General of the FAO decided to reject her appeal entirely.
6. The complainant filed her case before this Tribunal on 5 December 2003. She asks for the quashing of the decision to reject her appeal; rectification of her record of service and the information notified to the UN; restitution of the amount she reimbursed; moral and material damages. In her rejoinder she claims that the FAO failed to cooperate fully with the UN disciplinary proceedings against her. It was also the finding of the UN Administrative Tribunal that the FAO “was less than cooperative in providing information”. The rationale for such inaction is to be found in an internal advice drawn up by the FAO. It was proposed therein that the FAO should provide to the UN “the documents exchanged with [the complainant] during the course of the disciplinary proceedings, to the exclusion of any other additional information” and “no more information than that already given or made available to [the complainant] should be provided”.
7. The UN Administrative Tribunal found that such lack of collaboration was wrong. This Tribunal agrees. Such inaction, however, may have been beneficial rather than disadvantageous to the complainant, since the FAO had contended that she merited outright dismissal (as also found by the UN Administrative Tribunal).
8. This Tribunal has jurisdiction to consider claims brought by former employees against decisions of the defendant organisation – in this case the FAO. However, the complainant’s factual contentions have already been adjudged by another Tribunal. The UN Administrative Tribunal considered whether it was or not the *forum conveniens* and found that, since the FAO had declined to exercise disciplinary power, and the UN had exercised it, it necessarily was the appropriate jurisdiction. The Tribunal entirely agrees, and finds that the facts that the complainant challenges are covered by *res judicata*. That being so, all her claims fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 May 2005, Mr Michel Gentot, President of the Tribunal, Mrs Flerida Ruth P. Romero, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

Flerida Ruth P. Romero

Agustín Gordillo

Catherine Comtet