

The Administrative Tribunal,

Considering the complaint filed by Mrs F. Z. against the Food and Agriculture Organization of the United Nations (FAO) on 24 October 2006, the Organization's reply of 28 February 2007 and the letter of 19 April 2007 by which the complainant informed the Registrar of the Tribunal that she did not wish to enter a rejoinder;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a French national born in 1969, joined the FAO in September 1997 under a three-year fixed-term contract which was subsequently extended on a regular basis. She was assigned to the Administrative Services Division as Assistant Commissary Manager and Catering Liaison Officer at grade P-3.

During the last quarter of 2002 the Office of the Inspector-General conducted a review of the Commissary's purchasing policies and procedures. In the context of that review, it investigated the relations between Commissary staff and suppliers. In 2001 and 2002 the complainant had attended a trade fair in Cannes (France) for which her expenses had been paid by the Organization. The Office of the Inspector-General asked her to provide evidence of the payment of her hotel bills on these occasions. Regarding her stay in 2001, the complainant initially stated that she had paid a first instalment, amounting to 381 euros, by cheque drawn on her husband's bank account, but that when she had gone to pay the balance, amounting to some 60 euros, she found that this second instalment had been paid by a supplier who had booked the room for her, whose representative would not accept reimbursement.

The Office of the Inspector-General took the view that the payment of this small amount on her behalf, though inappropriate, was not a matter for serious concern, but that the circumstances surrounding the payment of the first instalment ought to be clarified. Despite several requests, the complainant refused to provide evidence of her payment of the first instalment on the grounds that her husband considered such requests to be an invasion of his privacy. In light of the complainant's refusal to cooperate, the Office of the Inspector-General recommended that the matter be reviewed by the Human Resources Management Division with a view to imposing a disciplinary measure.

By a memorandum of 20 June 2003 the Director of the Human Resources Management Division asked the Office of the Inspector-General to make further inquiries, since she considered that she did not have sufficient information to take a decision on the matter. The Inspector-General reported in November 2003 that further questions had been put to the complainant concerning the first instalment of the 2001 hotel bill, but that she had refused to answer most of them.

On 9 December 2003 the complainant lodged an appeal with the Director-General, urging him to bring the investigation to a close. She reiterated her version of the facts concerning the payment of her hotel bill and contended that, as a consequence of the ongoing investigation, not only had she been denied the conversion of her fixed-term contract into a continuing appointment, but her application for the vacant post of Commissary Manager, at grade P-4, had not been considered. This appeal was dismissed by the Assistant Director-General in charge of Administration and Finance in a letter of 23 January 2004. He stated that the decision on the conversion of her contract had been suspended pending the outcome of the Inspector-General's investigation, because it was necessary to establish that she met the highest standards of efficiency, competence and integrity. He added that she would shortly be informed of the findings of the investigation and of the Organization's position thereon. As for her application for the post of Commissary Manager, he assured her that the recruitment procedure had been correctly followed.

On 2 February 2004 the complainant sent a memorandum to the Assistant Director-General in which she presented a different version of the facts. She explained that, as she had experienced difficulties in booking a hotel room, she

had accepted the help of a supplier's representative. On the eve of her departure, she had discovered that the room had been paid for by the supplier, whereupon she had reimbursed the supplier's representative in cash. The representative had then informed the hotel that the bill was to be made out in the complainant's name.

The complainant's memorandum was forwarded to the Office of the Inspector-General, which attempted to verify her new version of the facts. It contacted the supplier in question, which confirmed in writing that its representative appeared to have been reimbursed by the complainant as claimed. The Inspector-General informed the Assistant Director-General accordingly by a memorandum of 31 March, but she observed that the supplier's statements could be afforded only limited credence, given that it was aware that an investigation was under way and had every interest in confirming the complainant's version.

By a memorandum dated 4 November 2004 the Director of the Human Resources Management Division informed the complainant that the Organization proposed to impose on her the disciplinary measure of demotion because of her lack of cooperation with and obstruction of the investigation and for having provided false information. In accordance with the procedure set forth in Section 330 of the FAO Administrative Manual, she invited the complainant to submit her views in writing within five days of receipt of her memorandum. In her comments dated 12 November 2004 the complainant stated that she profoundly regretted having provided a false version of events, and she drew attention to the fact that she had been under great stress during the period of the investigation, particularly because of a difficult pregnancy and an increased workload due to the absence of her supervisor. After having discussed the complainant's comments with her, the Director of the Administrative Services Division forwarded them to the Director of the Human Resources Management Division together with his own comments in a memorandum dated 19 November 2004, in which he explained in detail why he considered that the proposed disciplinary measure should be commuted to a one-month suspension without pay. He noted the quality of the complainant's work and the highly positive view of the new Commissary Manager regarding her professional competence, commitment and effectiveness. He also observed that she would have been the "natural candidate" for the Commissary Manager position.

On 11 February 2005 the Assistant Director-General wrote to inform the complainant that, after a review of the entire file, it had been decided to impose on her the disciplinary measure of demotion to grade P-2 and to assign her to a post outside the Commissary that did not involve procurement or dealing with suppliers.

The complainant's appointment was converted to a continuing appointment on 25 February 2005. She was then transferred, with effect from 1 April 2005, to the grade P-2 post of Accountant in the Central Accounting Service. After having appealed unsuccessfully to the Director-General against both the disciplinary measure and the transfer, she lodged an appeal with the Appeals Committee on 30 June 2005. She contended that the disciplinary measure imposed on her was disproportionate, that the quality of her work had not been taken into account and that the Organization's delay in reaching a decision had caused her additional harm.

In its report issued on 31 May 2006 the Appeals Committee recommended that the appeal be rejected as unfounded. With regard to the proportionality of the disciplinary measure, it noted that this was a matter that lay within the discretion of the Director-General and found no convincing evidence that the Director-General had exercised his discretion wrongly. It considered that the decision to appoint another person to the position of Commissary Manager was likewise within the Director-General's discretion and that, regardless of whether a candidate is shortlisted and has the support of his or her supervisor, he or she is not guaranteed a post. Referring to the Tribunal's case law, the Committee added that work performance was not a determining factor in establishing the punishment. It also stated that the cases where proportionality of punishment had been examined carefully by the Tribunal mostly involved dismissal as the disciplinary measure.

By a letter of 27 July 2006 the Director-General informed the complainant that he had decided to reject her appeal as unfounded, in accordance with the recommendation of the Appeals Committee. That is the impugned decision.

B. The complainant contends that, in deciding to impose on her the disciplinary measure of demotion to grade P-2, the Director-General ignored an essential fact, namely the likelihood that she would have been promoted to grade P-4, but for the disciplinary investigation. Indeed, the grade P-4 post of Commissary Manager had become vacant during the period when the Office of the Inspector-General was conducting its investigation, and the Director of her Division, who was responsible for preparing a comparative evaluation of the candidates for the post and submitting it to the Selection Committee, had stated that she would have been the "natural candidate" for the post. Furthermore, she had received excellent performance appraisals in the previous six years. According to the

complainant, it is more than likely that the Selection Committee would have endorsed the Division Director's assessment and that the Director-General, whose discretion with regard to appointments is limited by the criteria stipulated in the FAO Constitution, General Rules and Administrative Manual, would then have appointed her to the post. Instead, she says, her candidature was not even considered. Moreover, by failing to recognise the limits on the Director-General's discretion in this area, the Appeals Committee and, in turn, the Director-General himself committed an error of law.

The complainant also argues that in determining the disciplinary measure to be imposed on her the Director-General did not exercise his discretion properly, since he failed to take into account an essential fact, namely her excellent work performance.

She asks the Tribunal to set aside the impugned decision and to order the FAO to restore her to grade P-3 with retroactive effect from 1 April 2005 and to transfer her back to the post of Assistant Commissary Manager. In lieu of the demotion and transfer that were imposed on her, she requests that the Organization be ordered to impose a one-month suspension without pay. She also claims moral damages, which she evaluates at 50,000 euros, and costs.

C. The Organization submits that the decision to demote the complainant was both lawful and appropriate, since it considers that making false statements deliberately and continuously is a serious offence. It states that it had even considered dismissal, but that it opted for a less severe measure after she decided to tell the truth. It emphasises that the complainant was given the benefit of the doubt and had every opportunity to respond to the findings of the investigation.

According to the FAO, the complainant's presumption that she would have been promoted is pure speculation. Consequently, the argument that she in effect suffered a "double demotion", as she appears to suggest, cannot be sustained. It points out that there is no evidence that the Selection Committee did not apply the relevant criteria in recommending a candidate for the post of Commissary Manager. It asserts that the complainant's arguments concerning her performance were taken into account, but were not regarded as justifying a reduction in the disciplinary measure imposed. This approach, it submits, is consistent with the case law according to which satisfactory performance should not result in the imposition of a less severe disciplinary measure.

CONSIDERATIONS

1. The complainant was demoted from grade P-3 to grade P-2 as a disciplinary measure for obstructing an internal investigation into her travel expense claims and supplying false information. She impugns the decision of 27 July 2006 by which the Director-General of the FAO, in accordance with the recommendation of the Appeals Committee, dismissed her appeal concerning the proportionality of that measure.
2. The complainant contends that in reaching his decision the Director-General ignored an essential fact, namely, the likelihood of her promotion to grade P-4 but for the investigation. She argues that given her performance record, her Division Director's view that she would have been the "natural candidate" for the Commissary Manager position and the fact that he was the official responsible for evaluating and recommending to the Selection Committee the best candidate for the position, there was a real likelihood of her being appointed to that position. She relies on Judgment 1871 as authority for the proposition that the Director-General's discretion to make an appointment is limited by the relevant provisions of the FAO's Constitution, General Rules and Administrative Manual, and she submits that the Appeals Committee and the Director-General committed an error of law by overlooking those limits.
3. These arguments are without merit. Leaving aside the question whether likelihood can be assimilated to a fact, the vacancy for the post of Commissary Manager was purely coincidental and has no bearing on the proportionality of the disciplinary measure imposed for her actions while she was employed in the P-3 post. Moreover, the argument is grounded on the complainant's assertion that she was the best candidate. This was based on her Division Director's comments written in the context of a memorandum in which he was advocating the imposition of a lesser disciplinary measure for her misconduct. Even if her Division Director was of the view that she was the best candidate for the position and was prepared to make that recommendation to the Selection Committee, the complainant ignores the role of the Selection Committee, whose task it is to consider the qualifications and competencies of all candidates and, as stated in Judgment 1871, under 10, "to recommend for

selection the candidate whose qualifications most closely meet the requirements of the post”.

4. Further, the facts of the present case are clearly distinguishable from those in Judgment 1871. In that case, the Director-General in making the appointment at issue gave paramount importance to the principle of geographic distribution. This resulted in the selection of an applicant who was second on the list recommended by the Selection Committee. Following a review of the relevant provisions of the FAO’s Constitution and General Rules, the Tribunal concluded that the Director-General was mistaken in his interpretation. The Tribunal held that “the essential qualifications required” were the priority criterion. It was not contested that the complainant’s qualifications in that case were more pertinent to the post than those of the other candidates.

5. In the present case, the complainant has not adduced any evidence regarding the qualifications of the other candidates, nor has she alleged that the selection process was flawed. Her assertion that there was a real likelihood of her being appointed to the position of Commissary Manager amounts to no more than speculation.

6. The complainant also contends that in reaching his decision the Director-General did not exercise his discretion properly, since he failed to take into account her excellent work performance. In support of this argument, she points to the Appeals Committee’s statement, adopted by the Director-General, that “work performance is not a determining factor”. The complainant also alleges that the Appeals Committee and, in turn, the Director-General were erroneously of the view that the principle of proportionality was only applicable to the sanction of dismissal.

7. The Tribunal finds that the complainant has taken the Appeals Committee’s statement out of context. The Committee engaged in an extensive analysis specifically directed at determining a disciplinary measure that was proportional to the misconduct. It observed that in arriving at an appropriate measure, it is the nature of the offence and its possible consequences, and not the benefit obtained by the offender, that is relevant. The Committee considered and rejected the complainant’s argument that the penalty was disproportionate given the likelihood of her promotion. The Committee also took into account the complainant’s performance but found that this factor was not determinative.

8. Although the Committee referred to the fact that much of the Tribunal’s case law on proportionality related to the measure of dismissal, it is clear from its analysis that it was not under the impression that proportionality was only relevant to dismissal.

9. The complainant’s arguments with respect to proportionality fail. The complaint must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2007, Ms Mary G. Gaudron, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Mary G. Gaudron

Dolores M. Hansen

Patrick Frydman

Catherine Comtet

