

110th Session

Judgment No. 2989

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Å. E. against the Food and Agriculture Organization of the United Nations (FAO) on 18 August 2008 and corrected on 6 June 2009, the FAO's reply of 28 September, the complainant's rejoinder of 2 December 2009 and the Organization's surrejoinder of 15 March 2010;

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

Having examined the written submissions;

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

A. The complainant, a national of Norway born in 1948, joined the World Food Programme (WFP) – an autonomous joint subsidiary programme of the United Nations and the FAO – in August 1998 as Chief of Ocean Transport Services in Rome, Italy, under a two-year fixed-term contract at grade D-1. On 1 January 2001 his contract was converted to indefinite status. From 6 to 19 May 2002 he served as acting Director of the Transport Division in Rome. On 14 April 2003 he was placed on administrative leave, and in May he accepted the post of Shipping Officer in Mombasa, Kenya, to which he was transferred on 30 June. This was a P-5 post, but the complainant retained his D-1 grade.

In memoranda dated 18 October 2005 and 17 February 2006 addressed, respectively, to the Director of Human Resources and to the Director of Oversight Services Division (OSD) and Inspector General (IG), the complainant made allegations of fraud, harassment and abuse of authority against the Country Director and the Senior Logistics Officer of the WFP in Kenya. On 20 February 2006 the Director of the Legal Division asked the Office of Inspections and Investigations (OSDI) to investigate these allegations. Shortly afterwards, on 20 March, the complainant sent an e-mail to the Director of Human Resources in which he alleged that the Country Director and the Senior Logistics Officer had misused the PACE (Performance and Competency Enhancement) procedure when preparing his 2005 performance appraisal. The following day, he lodged a formal claim of retaliatory harassment in connection with this 2005 appraisal. An investigation into these various matters was conducted in Kenya in May 2006. In its report of 9 October 2006 OSDI stated that the complainant's allegations were not supported by the available evidence, which, on the contrary, led it to conclude that the complaint was malicious. It recommended that administrative or disciplinary action be taken against him.

By a memorandum of 8 December 2006 the Director of Human Resources, referring to the said report, informed the complainant that the Administration proposed to impose on him the disciplinary measure of summary dismissal. She charged him with serious misconduct in that he had:

- i. Submitted malicious claims of harassment and abuse of power against [the Country Director and Senior Logistics Officer] and ensured dissemination of the same throughout the [Country Office] in a manner intended to undermine the authority of these officials;
- ii. Acted in an insubordinate way in that [he] failed to comply with the [performance appraisal] procedures and failed to ensure that [his] staff so complied;
- iii. Submitted false statements and other statements designed to mislead the investigation or twist the facts in an attempt to justify [his] actions and suit [his] purposes;

- iv. In doing all of the above, acted in a manner that would impede the smooth functioning of the Programme's operations and contrary to the best interests of the Programme;
- v. Failed to comply with the standards of conduct expected of an international civil servant through using rude and inappropriate language towards WFP colleagues, supervisors and outside officials;
- vi. Failed to comply with standards of conduct in that [his] actions [were] designed to further [his] personal interests as opposed to furthering the interests of the Programme;
- vii. Committed abuse of power towards [a junior staff member];
- viii. In acting as described above, gravely jeopardized the reputation of the Programme."

She asked the complainant to respond to these charges in writing within ten days. By a further memorandum, dated 2 January 2007, the Director of Human Resources notified the complainant of the decision to suspend him with full pay with immediate effect pending completion of the disciplinary proceedings. She stated that this was not a disciplinary measure.

The following day, the complainant wrote to the Executive Director of the WFP indicating that the above-mentioned memoranda contained serious unfounded and malicious allegations against him. He contended that he was being harassed and that he had not been granted sufficient time to respond to the charges. He asked the Executive Director to waive the suspension measure of 2 January 2007. The Executive Director replied that he would not waive the suspension measure noting that the Director of Human Resources had in the meantime agreed to extend the time limit for responding to the charges. On 15 February 2007 the complainant submitted his response to the Director of Human Resources, contesting the accusations made against him and asserting that his statements had always been sincere. He stressed that some of the accusations levelled at him were made on the basis of OSDI reports that had not been disclosed to him, and on which he had hence not been given the opportunity to comment.

In a memorandum dated 20 February 2007 addressed to the Director of OSD/IG, the complainant contended that he had suffered

retaliation for having reported irregularities in 2002 concerning, inter alia, a contract between the WFP Office for Afghanistan and a company based in Sudan for the delivery of trucks, and for having subsequently reported misconduct by officials involved in logistics operations in Kenya. He stated that his case was brought on the basis of the “Whistleblower” Protection Policy. On 1 March he wrote again to the Director of OSD/IG, alleging conflict of interest on the part of the Chief of OSDI who had issued the report of 9 October 2006.

By a memorandum of 7 March 2007 the complainant was informed that, following a detailed review of his comments and of the available evidence, the Executive Director had decided to impose on him the disciplinary measure of summary dismissal. On 6 April the complainant wrote to the new Executive Director requesting a review of that decision, reiterating his allegations of fraud and conflict of interest. He requested immediate reinstatement and an investigation into the actions of the WFP’s Office in Kenya. By a letter of 14 June the Executive Director notified the complainant that his requests were rejected, as she was satisfied that the decision taken by her predecessor to dismiss him summarily met the requirements of due process and was substantively correct. Consequently, the complainant filed an appeal with the Appeals Committee on 8 July 2007 reiterating his accusations of corruption and fraud.

In the meantime, on 5 June 2007, the Director of OSD/IG wrote to the Executive Director concerning the complainant’s memorandum of 20 February 2007. He indicated that OSD had found that the complainant had engaged in a “protected activity” as defined in the Whistleblower Protection Policy insofar as he had reported alleged fraud in 2002 in connection with the buying of trucks by the WFP Office for Afghanistan. On the other hand, it held that the complainant had not engaged in a protected activity when alleging misconduct by staff in Kenya, given that his allegations had not always been made in good faith and were not substantiated. The Director also observed that, following the complainant’s allegations, OSDI had conducted an investigation in Kenya in 2006 but found that none of the allegations were substantiated.

In its report of 11 February 2008 the Appeals Committee held that there were no procedural defects in the disciplinary proceedings leading to the complainant's summary dismissal and that the finding of serious misconduct against him was correct based on available evidence. It concluded that the disciplinary measure of summary dismissal was justified and commensurate with the gravity of the case, and recommended that the appeal be rejected as unfounded.

By a letter of 18 May 2008, which is the impugned decision, the Director-General of the FAO informed the complainant that he had decided to endorse the Appeals Committee's recommendation to reject his appeal.

B. The complainant contends that the decision to dismiss him summarily was taken on the basis of the inaccurate and highly inflated OSDI report of 9 October 2006. He alleges conflict of interest in that, for several months after the investigation concerning operations in Kenya was carried out, the investigator's wife worked under the supervision of the official who became Country Director in Kenya in October 2006. Before taking up his functions there, that official was Country Director for Afghanistan, where irregularities, in particular a lack of transparency, had been observed. To support his view, the complainant points to the draft report of the Office of Internal Audit (OEDA) of October 2002 concerning the management of the WFP's Office in Afghanistan, in which several failures to comply with applicable rules and procedures were identified.

The complainant submits that he was denied the protection provided for in the Whistleblower Protection Policy and that the corruption he reported was never properly dealt with. In 2003 he was placed on administrative leave and was offered 118,000 United States dollars to resign following his allegations of corruption. Having refused this offer, he was transferred to a position in Mombasa, which in his view amounted to demotion given that, although he held grade D-1, his post was graded P-5. He also alleges that, because he declined offers of "kickbacks" and reported corruption, he was harassed, intimidated and denied promotion and he received threats to his life.

He also alleges irregularities in the internal appeal proceedings. He states that his request to have two members of the Appeals Committee removed from the panel due to possible conflict of interest was rejected and that in January 2008 he was denied the right to present, clarify and defend his case in person before the Appeals Committee.

The complainant asks to be reinstated in a post at grade D-2 or above and/or to be awarded “financial and emotional compensation”. He also asks the Tribunal to grant him compensation in the amount of approximately 480,000 United States dollars, corresponding to the salary and pension he would have received had he been allowed to work until retirement age. He claims a minimum of five million dollars in financial compensation for wrongful dismissal and “emotional suffering”, additional compensation for harassment, as well as a written and a verbal apology. Lastly, he claims costs.

C. In its reply the Organization states that the decision to dismiss the complainant summarily for serious misconduct was taken in accordance with the relevant rules and regulations and was a proportionate response to the complainant’s serious misconduct. It refers in particular to the OSDI report, according to which the complainant made unfounded and unsupported allegations of fraud, corruption, conflicts of interest and harassment. OSDI reproached him for his insubordination, stressing that his failure to carry out the instructions of the Country Director and the Senior Logistics Officer undermined the operations and reputation of the Programme. It also found that the complainant had twisted the facts and misled the investigation to further his own interests. Moreover, OSDI held that the complainant’s allegations of fraud were inappropriate and slanderous and that the complainant had openly communicated his views to his staff in an insubordinate manner designed to disrupt the coordination and cooperation between the WFP’s Office in Mombasa and the Country Office. The defendant submits that in so doing the complainant violated Sections 330.1.51 and 330.1.52 of the Administrative Manual.

The FAO argues that the complainant's actions contravened the Standards of Conduct for the International Civil Service, according to which managers and supervisors are responsible for ensuring a harmonious workplace based on mutual respect and should show genuine respect for different peoples, languages, culture, customs and traditions. Indeed, OSDI found that the complainant had shown disrespect for the customs and cultures of Kenya in a meeting with government representatives and had abused his authority by threatening the job security of a junior staff member.

Concerning the alleged breach of due process, the defendant asserts that the complainant was given access to all evidence, and was given the opportunity to reply and to offer explanations. His rights were hence fully and meticulously respected at all times. It adds that the Chairman of the Appeals Committee questioned the members of the Panel against whom the complainant alleged possible conflict of interest and decided to retain these members after they had confirmed they did not know the complainant and that they had no prior knowledge of the case. The defendant also indicates that the Committee has discretion in deciding to hear parties and that it acted in accordance with applicable rules. Moreover, the complainant's requests to have additional time to provide his comments were always granted.

The Organization contends that his allegations of fraud, conflict of interest, corruption, retaliatory harassment and abuse of authority are unsubstantiated. In its view, some allegations of harassment and abuse of authority made against the Country Director and the Senior Logistics Officer were aimed at undermining their authority. It stresses that OSDI concluded in 2006 that there was no evidence of mismanagement, fraud or deliberate misuse of the WFP's funds by the aforementioned staff members. Lastly, the FAO denies that the complainant is a victim of the Programme's allegedly corrupt and fraudulent practices; on the contrary, it contends that he fabricated

these stories in reaction to events that put his own conduct in question. It emphasises that OSDI did investigate his allegations of retaliation in 2007 and found no link between the complainant's submission of information on possible fraud and corruption and the disciplinary measure imposed on him.

D. In his rejoinder the complainant reiterates his pleas and allegations. He stresses that he has always worked in the interest of the Programme, especially when struggling to introduce accountability and efficiency. He argues that he did not spread rumours of fraud but that it was "there for everyone to see".

E. In its surrejoinder the FAO maintains its position. It emphasises that there were eight accusations of misconduct against the complainant and that he failed to provide adequate explanations in response to the findings made by OSDI on these matters in 2006. It therefore maintains that the decision to dismiss him summarily was justified and commensurate with the gravity of the case.

CONSIDERATIONS

1. This complaint is brought against the Director-General's decision of 18 May 2008 in which he accepted the Appeals Committee's recommendation and rejected the complainant's appeal against his summary dismissal for serious misconduct.

2. Before turning to the complainant's submissions, it is noted that he requests an oral hearing. As the materials submitted by the parties are sufficient for the Tribunal to reach an informed decision, the application for an oral hearing is denied.

3. The complainant submits that the impugned decision is tainted by breaches of his due process rights. He contends in particular that the failure of the Executive Director to accede to his request for a

meeting constitutes a breach of his rights. The Tribunal observes that there is no statutory or other requirement that the Executive Director of the WFP meet with a staff member in these circumstances. The complainant was given ample opportunity to adduce evidence and make his case in accordance with the Programme's Regulations. In his complaint, the complainant has also made serious allegations regarding the Executive Director's motives for not meeting with him. These are unfounded allegations and are rejected.

4. He reiterates a claim of conflict of interest on the part of the Chief of OSDI who was involved in the investigation that led to the institution of disciplinary proceedings against him. This claim was fully investigated at the time it was initially made and rejected as being without foundation. The complainant has not adduced any evidence that would undermine that conclusion. Similarly, the Tribunal notes that he has failed to produce any evidence that the two members he sought to have removed from the Appeals Committee were in a position of conflict of interest.

5. The complainant submits that he was denied the right to present and defend his case in person before the Appeals Committee. In its report dated 11 February 2008, the Committee states that it decided not to accede to the complainant's request for an oral hearing on the grounds that the parties' detailed written submissions were "more than adequate for the Committee to make a determination". The Committee exercised its discretion in this matter and there is nothing on the record indicating that it did so improperly. Moreover, the Tribunal observes that throughout the course of the investigation, the disciplinary proceedings and the internal appeal, he was given the opportunity to present and defend his case fully.

6. Further, the complainant alleges that he was summarily dismissed in retaliation for being a whistle-blower in connection with information he uncovered while he was on duty in Rome in May 2002.

The fact that the complainant only raised that claim after he was informed of the commencement of disciplinary proceedings for serious misconduct undermines his argument. Additionally, his allegations of retaliation were investigated and the conclusion was reached that the allegations were unfounded. The complainant has not produced any evidence that would displace that conclusion.

7. Lastly, with regard to the merits of the findings of serious misconduct, the complainant has not adduced any evidence demonstrating that the findings were based on reviewable error. Given the seriousness of the misconduct, the Tribunal finds that the sanction of summary dismissal was proportionate.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 29 October 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet