

112th Session

Judgment No. 3089

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs J.M. W. against the Food and Agriculture Organization of the United Nations (FAO) on 6 December 2009 and corrected on 6 January 2010, the FAO's reply of 14 April, the complainant's rejoinder of 15 August and the Organization's surrejoinder dated 26 November 2010;

Considering Articles II, paragraph 5, and VII 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. Facts relevant to this case are to be found in Judgment 2600, delivered on 7 February 2007, concerning the complainant's first complaint. Suffice it to recall that on 30 June 2004 the complainant submitted a formal complaint alleging harassment and abuse of authority on the part of the Director of the Library and Documentation Systems Division (GIL), who had been her supervisor since 1996. The matter was referred to an Investigation Panel, which was not established until 10 June 2005 due to the unavailability of some of

its members. Subsequent attempts to schedule a meeting proved unsuccessful, particularly because of the complainant's refusal to appear before the Panel until its Rules of Procedure had been adopted. Although she was provided with a copy of the Panel's Rules of Procedure on 14 October, the complainant advised the Panel's secretariat that a meeting scheduled for 18 October "would need to be cancelled" owing to the late circulation of the said Rules of Procedure. The Panel's secretariat replied that it would still be possible for the Panel to carry out its investigation; alternatively, the complainant could lodge an appeal under Section 331 of the FAO Administrative Manual, which would cover those aspects of her case that did not concern harassment.

Subsequently, the complainant filed her first complaint with the Tribunal and on 18 May 2006 she was informed by the Director of the Human Resources Management Division (AFH) that her internal complaint of harassment would be put in abeyance pending the Tribunal's judgment on her case. The Tribunal dismissed her first complaint as irreceivable for failure to exhaust internal remedies. It considered that the proper course for the complainant following the submission of her harassment complaint would have been to treat the Organization's delay in establishing an Investigation Panel as an implied rejection of that complaint or a failure to take a decision thereon and to pursue an appeal with the Director-General and, if necessary, with the Appeals Committee.

Following the delivery of Judgment 2600, on 11 May 2007 the complainant lodged an appeal with the Director-General, asking that her complaint of harassment and abuse of authority be determined in accordance with Manual Section 331 and that a decision be taken on her outstanding requests for material and moral damages and costs. The Assistant Director-General ad interim replied by a letter of 9 July that the appeal was time-barred and thus irreceivable because the complainant had failed to comply with the time limit laid down in Staff Rule 303.1.311. He added that, as the Tribunal had not reviewed the merits of her case, the proper course would be for her complaint of harassment to be referred again to the Investigation Panel for an

investigation of the facts. On 6 August 2007 the complainant lodged an appeal with the Appeals Committee, reiterating the arguments and requests made in her appeal to the Director-General.

The Appeals Committee issued its report on 4 May 2009. It held that the appeal should not be considered time-barred, especially in light of the fact that Manual Section 331 contained no instructions on how to deal with a complaint in the event that the Organization failed to reply, nor did it indicate any time limit beyond which an implied decision could be inferred. It recommended that, in accordance with its Policy on the Prevention of Harassment (Administrative Circular 2007/05), the FAO establish an Investigation Panel to review the complainant's harassment complaint and that all appropriate arrangements to hear both the complainant and the Organization be made. With a view to ensuring the speedy establishment of the Panel, it suggested that a large pool of potential Panel members be considered. With regard to the complainant's requests for damages and costs, the Committee considered that it could not make a recommendation until the merits of the case had been reviewed by the appropriate entity. By a letter of 21 August 2009, which the complainant received on 15 September, the Director-General notified her of his decision to reject the recommendations of the Appeals Committee on the grounds that her appeal was time-barred. That is the impugned decision.

B. The complainant asserts that her complaint is receivable. She argues that the internal remedies have been exhausted and that she is impugning a final administrative decision pursuant to Article VII, paragraph 1, of the Statute of the Tribunal. She adds that there was nothing in Judgment 2600 or the Administrative Manual preventing her from resuming her grievance with the FAO after her first complaint had been found irreceivable by the Tribunal. In fact, it was suggested in that judgment that she should do so in order to exhaust internal remedies. Moreover, she was expressly advised by the Administration that her internal harassment complaint would be put in abeyance pending the Tribunal's judgment on her case. She contends that, by rejecting her appeal as time-barred, the Director-General erred in fact

and in law and acted in a manner inconsistent with the Organization's earlier undertakings.

On the merits, the complainant reiterates the pleas put forward in her first complaint before the Tribunal, alleging that the Organization failed to observe the terms of her appointment, the relevant provisions of the Administrative Manual, as well as the Organization's Policy on the Prevention of Harassment. She maintains that for several years her supervisor subjected her to harassment and abuse of authority, in particular by belittling her professional competence, underrating the quality of her work, disregarding her expertise and training, sidelining her research, discriminating against her on the basis of gender and age, excluding her from any decision-making process and from standard communications, denigrating librarianship and librarian services and fostering an environment that encouraged disrespect for librarians. She considers that the Organization did not fulfil its duty of good faith and that it failed to address the situation, as a result of which her health was seriously affected and her professional reputation and career prospects were significantly impaired.

The complainant claims 200,000 United States dollars in damages for the pain and suffering which she endured, 35,000 dollars in reimbursement of medical expenses, 30,000 dollars in compensation for the travel expenses she incurred during the internal appeal process, and costs in respect of the proceedings before the Tribunal.

C. In its reply the Organization submits that the complaint is irreceivable. It argues that, as the complainant's appeal to the Director-General was not lodged within the 90-day time limit laid down in Staff Rule 303.1.311, the subsequent appeal lodged with the Appeals Committee was time-barred under Manual paragraph 331.3.31, which requires that the prescribed time limits be met in order for an appeal to be receivable. It considers that the members of the Appeals Committee based their finding on receivability on an entirely mistaken premise as they failed to consider the link between the receivability of an appeal to the Director-General and that of an appeal to the Appeals Committee. Relying on the Tribunal's statement in Judgment 2600 that "at any time between November 2004 [...] and [...] June 2005 [...] the

complainant could have treated the failure to constitute a Panel as an implied decision by the Director of AFH [...] to close the case”, it contends that the Tribunal identified the specific time frame within which an appeal against such a decision would have been receivable under the Organization’s Policy on the Prevention of Harassment, but that time frame had long passed by the time the complainant submitted her appeal.

On the merits, the defendant reiterates the position that it elaborated in the reply and surrejoinder submitted in the proceedings leading to Judgment 2600, namely that the complaint is devoid of merit and that the complainant has failed to demonstrate any wrongful act on the part of the Organization. It firmly rejects the accusations of harassment and abuse of authority and considers that, in reality, they reflect a personality conflict between the complainant and the Director of GIL and a mistaken appreciation by the complainant of her own role within the Organization. It explains that the complainant not only disagreed with the process of downsizing library services, which was mandated directly by the Director-General in the context of the FAO’s reform and modernisation, but she also overrated the value of her expertise as a librarian for the Organization as a whole. It contends that it was her resentment of the Organization’s policies, in particular the implementation of a programme to rationalise the dissemination of information, which the complainant misinterpreted as a breach of her terms of appointment, the relevant provisions of the Administrative Manual, and the Organization’s Policy on the Prevention of Harassment. While accepting full responsibility for the delays in establishing an Investigation Panel, it accuses the complainant of having frustrated the investigation of her internal complaint of harassment and of having shown a profound misunderstanding and disrespect for the applicable rules.

D. In her rejoinder the complainant maintains that the complaint is receivable, since it was filed pursuant to Article VII, paragraph 1, of the Tribunal’s Statute against the Director-General’s decision of

21 August 2009 to reject her appeal. She accuses the FAO of presenting an inaccurate and misleading account of the facts in its reply, of misrepresenting her arguments, and of failing to address the merits of her complaint.

E. In its surrejoinder the Organization underlines all its efforts to advise the complainant that the proper course would be for her internal harassment complaint to be referred to the Investigation Panel. It otherwise maintains its position in full both on the receivability and the merits of the complaint.

CONSIDERATIONS

1. The complainant, a former staff member of the Food and Agriculture Organization of the United Nations (FAO), submitted a formal complaint against her then supervisor pursuant to the FAO Policy on the Prevention of Harassment on 30 June 2004. For various reasons, there has not yet been an investigation of the complaint. An Investigation Panel was not established until 10 June 2005. Thereafter, the complainant declined to meet with the Panel until she was provided with its Rules of Procedure. These were not provided until 14 October. A meeting scheduled for 18 October never took place, as the complainant advised the Panel's secretariat that it would have to be cancelled due to the late circulation of the Panel's Rules of Procedure. On 18 November the complainant was assured that the Panel could meet with her without further delay. She replied on 5 December indicating that she was obtaining legal advice. On 16 December 2005 she filed a complaint with the Tribunal on the basis that there was a failure to take a decision with respect to her claim within a reasonable time. In that complaint, she asked the Tribunal to make a finding of harassment and to grant consequential relief, including material and moral damages. On 18 May 2006 the Director of the Human Resources Management Division (AFH) informed her that her claim of harassment "[would] be put in abeyance pending the [Tribunal's] judgment".

2. In Judgment 2600, delivered on 7 February 2007, the Tribunal found that the complaint filed with it on 16 December 2005 was irreceivable and dismissed it. It did so on the basis that, assuming there had been either an implied decision to reject the complainant's claim of harassment or a failure to take a decision on it, the complainant should have lodged an appeal with the Director-General and then, if necessary, have pursued an appeal with the FAO Appeals Committee. The Tribunal explained that these steps were necessary "before it could be said, either in accordance with Article VII(1) of [its] Statute, that the complainant had exhausted the means available to resist the decision, or as in, for example, Judgment 2039 that she 'ha[d] done [her] utmost, to no avail, to accelerate the internal procedure'".

3. On 11 May 2007 the complainant wrote to the Director-General stating that she was submitting an "appeal [...] in the matter of [her] Complaint of Harassment and Abuse of Authority, submitted to FAO on 30 June 2004". She stated in her appeal:

"I respectfully request a decision in accordance with FAO Administrative Manual Section 331 on my Complaint, based on the implied decision of the Director [of] AFH to close the case, or failure to take a decision."

Manual paragraph 331.3.31 provides that an appeal is not receivable if any of the time limits specified in the Staff Rules have not been met. Staff Rule 303.1.311 provides that an appeal must be lodged "within 90 days from the day of receipt of the decision impugned". The complainant's appeal did not identify any particular matter or event occurring within the previous 90 days, which might be said to have indicated an implied decision by the Director of AFH to close the case. However, she did state that "because th[e] appeal [was] made on the basis of [...] Judgment 2600, that the delays did constitute an implied decision [...] or a failure [...] to take a decision [...], the matter can no longer be taken as being in abeyance". Although that statement indicates a misunderstanding of the Tribunal's judgment, the reference to the matter no longer being in abeyance is capable of indicating that the complainant was relying on the failure to reactivate the investigation of her complaint since the delivery of that judgment, a

little over three months before, as an implied decision either to close the case or to take no further action on it.

4. The Assistant Director-General ad interim responded to the complainant's letter of appeal on 9 July 2007. In his letter of that date, he asserted that her appeal was time-barred on the basis that the Tribunal had held in Judgment 2600 that she could have appealed against an implied decision or a failure to take a decision "at any time between November 2004 [...] and 23 June 2005" and, accordingly, the time limit set by Staff Rule 303.1.311 had been greatly exceeded. He also stated that he "considered that the proper course [was] for [her] Complaint of Harassment [...] to be referred again to the Investigation Panel for an investigation of the facts". The complainant did not respond to that suggestion. Instead, she filed an appeal with the FAO Appeals Committee on 6 August 2007.

5. In its report to the Director-General of 4 May 2009 the Appeals Committee found that, as the Administrative Manual made no provision with respect to the "time-span for determining an implied decision", the appeal should not be considered time-barred. It further found that it could not make any recommendation with respect to the complainant's claim for damages "until the merits of the case [were] reviewed by the appropriate entity". So far as is presently relevant, it recommended that an Investigation Panel be assembled "to review the [complainant's] complaint of harassment, and to make all appropriate arrangements to hear both the complainant [...] and the respondent". The Director-General informed the complainant by a letter of 21 August 2009 that he had decided to reject the recommendations of the Appeals Committee on the basis that her appeal was time-barred. He also rejected the recommendation for the investigation of her complaint of harassment because she had "refused to proceed according to the procedure in the Policy and [had] chose[n] not to lodge an appeal against how [her] complaint was dealt with under that procedure". That is the decision impugned before the Tribunal.

6. The complainant again seeks to have the Tribunal make a finding of harassment and make an order for the payment of damages for the pain and suffering which she endured, as well as for the reimbursement of medical expenses. She also seeks an order for costs and expenses incurred in travelling from Canada to Rome for the hearing of her appeal, as well as the costs of the present proceedings. The FAO maintains its argument that the complaint is irreceivable and, also, submits that it should fail on the merits.

7. In Judgment 2600 the Tribunal set out the various events that had occurred between the complainant's submission of her claim of harassment and the filing of the complaint under consideration in that case. It stated, under consideration 10, that:

“at any time between November 2004, when she was informed of the unavailability of Panel members, and 23 June 2005, when the first attempt was made to arrange a hearing, the complainant could have treated the failure to constitute a Panel as an implied decision by the Director of AFH [...] to close the case.”

It is on the basis of this statement that the FAO argues that the complainant's appeal of 11 May 2007 was time-barred. However, that argument overlooks the Tribunal's further statement that “the complainant did nothing [between November 2004 and 23 June 2005] to indicate that she had elected to treat that delay as an implied decision”. An implied decision occurs only when a person who has submitted a claim is entitled to treat delay, inactivity or some other failure as constituting a decision to reject his or her claim and elects to do so. As there was no election by the complainant during the period in question, there was no implied decision at that time. Accordingly, the argument of the FAO as to receivability must be rejected.

8. For the sake of clarity it may be noted that, if the person concerned has elected to treat silence or delay as an implied decision and to impugn it within the stipulated time, the Administration may, nonetheless, still take an express decision on the claim.

9. The complainant is also mistaken in her understanding of Judgment 2600 insofar as she appears to have taken the view that

the Tribunal held that there had been an implied decision to close the case or a failure to take a decision that entitled her to lodge an appeal and bypass an investigation pursuant to the FAO Policy on the Prevention of Harassment. In Judgment 2600 the Tribunal made certain assumptions that were favourable to the complainant and on the basis of which it held that the complaint was not receivable. Had it found that there had been an implied decision, the time limit for lodging an appeal would have expired well before the judgment was delivered. In fact and in law, all that had happened was that the investigation of her complaint of harassment had been delayed, first by reason of the failure to assemble an Investigation Panel, then by reason of her refusal to attend a meeting until she was provided with the Rules of Procedure, and, eventually, her complaint was placed in abeyance pending a decision on her first complaint to the Tribunal. It was still in abeyance when the complainant initiated her appeal on 11 May 2007, no steps having been taken in the intervening three months either to reactivate the investigation or to close the case.

10. As already mentioned, the complainant's letter of appeal is capable of indicating that the failure to reactivate the investigation of her complaint was an implied decision to close the case or to take no further action on it. It should be so read. It was not for the complainant to reactivate the investigation and, given that more than three months had passed since the delivery of Judgment 2600 without any action being taken, she was entitled to treat that failure as an implied decision to close the case or to take no further action on her complaint of harassment. There is no reason why one and the same document cannot constitute an election and a notice of appeal, and the complainant's letter of 11 May must be treated as such. It follows that the complainant's appeal was filed within the time allowed by Staff Rule 303.1.311. Accordingly, the present complaint is receivable.

11. As the complainant's claim of harassment had not been investigated, the Appeals Committee was correct to conclude that it could not make any recommendation on her claim for damages and also to recommend that an Investigation Panel be assembled. The

Director-General's decision not to follow that recommendation was based in large part on his erroneous view that the complainant's appeal was time-barred. He was also in error in basing that decision on the complainant's earlier failure to lodge an appeal. As already stated, her complaint of harassment was placed in abeyance pending the Tribunal's decision on her first complaint. That situation could not be altered by the complainant's earlier decision to file her first complaint without lodging an appeal. It follows that the Director-General's decision of 21 August 2009 must be set aside.

12. Although the impugned decision must be set aside, it does not follow that the Tribunal should proceed to a consideration of the complainant's claim of harassment or her claim for damages. In the absence of any investigation of the facts, the Tribunal can only remit the matter to the Director-General for investigation in accordance with the FAO Policy on the Prevention of Harassment. On completion of the investigation, it will be for the complainant to take such further action in accordance with the Staff Rules as she may be advised.

13. The complainant is responsible for a considerable part of the delay that has occurred since she first filed her complaint of harassment. Notably, she is responsible for the delay occasioned by the filing of her first complaint. She is also responsible for the delay resulting from the filing of her appeal instead of accepting the advice of the Assistant Director-General ad interim that the proper course was for the matter to be referred to an Investigation Panel for an investigation of the facts. However, she was not responsible for the delay occasioned by the failure to establish an Investigation Panel until 10 June 2005. Nor is she responsible for the delay resultant upon the filing of her second complaint. That is the consequence of the Director-General's erroneous decision to reject the recommendation of the Appeals Committee. The complainant is entitled to moral damages in the amount of 4,000 euros for the delay for which she is not responsible.

14. Given that the complainant could have accepted the advice of the Assistant Director-General ad interim of 9 July 2007 that the matter should be referred to an Investigation Panel, it is not appropriate to make an order for the costs and expenses associated with her appeal. However, she is entitled to costs with respect to the present proceedings in the amount of 1,000 euros.

DECISION

For the above reasons,

1. The decision of the Director-General of 21 August 2009 is set aside.
2. The matter is remitted to the Director-General for an investigation of the complaint of 30 June 2004 in accordance with the FAO Policy on the Prevention of Harassment, such investigation to commence within 40 days of the date of this judgment.
3. The FAO shall pay the complainant moral damages in the amount of 4,000 euros.
4. It shall also pay her costs in the amount of 1,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 4 November 2011, Ms Mary G. Gaudron, Vice-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 8 February 2012.

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