C. (No. 5)

v.

FAO

120th Session **Judgment No. 3484**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr A. C. against the Food and Agriculture Organization of the United Nations (FAO) on 18 October 2012 and corrected on 5 December 2012, the FAO's reply of 27 March 2013, the complainant's rejoinder of 17 May 2013 and the FAO's surrejoinder of 22 October 2013;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant essentially challenges the FAO's rejection of his request to be transferred back to the Security Service.

Facts relevant to this case are to be found in Judgment 3022, delivered on 6 July 2011. Suffice it to recall that on 7 May 2008 the complainant filed an internal appeal against the decision to transfer him for health reasons from the post of Assistant Security Supervisor in the Security Service to the post of Stock Control Clerk in the Infrastructure and Facilities Management Service (AFSI) with effect from 7 January 2008. His appeal being rejected, he filed his second complaint with the Tribunal, which the Tribunal dismissed in Judgment 3022 on the ground that the FAO had not acted in a hasty or

unreasonable way when it decided to transfer the complainant outside the Security Service.

In the period between October and December 2008, the FAO issued two vacancy announcements in the Security Service, one for a Security Supervisor post at grade G-5 and another one for three Assistant Security Supervisor posts at grade G-4. The complainant applied for the G-5 Security Supervisor post but his application was not successful.

On 19 January 2009 the complainant asked the Chief Medical Officer to reconsider his case of transfer for health reasons from the Security Service. Following a medical review in the course of which the complainant underwent a series of exams, the Chief Medical Officer reported to the Director of the Human Resources Management Division (AFH) that he considered the complainant "medically fit for duties as a guard". On 25 March 2009 the complainant reiterated in writing his wish to return to his previous duties in the Security Service and on 29 April 2009 he met with the Director of AFH to discuss the matter. By a memorandum of 2 October 2009, the Director of AFH denied the complainant's request for a transfer back to his former post, stating that no position matching his qualifications and experience was available in the Security Service but, should one become vacant in that service, he could apply for it and his application would be duly considered in the light of his relevant experience and service record.

On 5 November 2009 the complainant appealed this decision with the Director-General and soon after he tendered his resignation from the FAO effective 7 January 2010. Following the rejection of his appeal by the Director-General on 21 December 2009, he filed an appeal with the Appeals Committee on 25 January 2010 asking, inter alia, that he be transferred back to the Security Service with effect from 25 March 2009, that his career be reconstructed with all consequences that attach to such decision and that he be awarded material and moral damages and costs. After holding a hearing, the Appeals Committee recommended in its report of 6 March 2012 the rejection of the appeal insofar as it concerned the transfer decision. It nevertheless recommended the payment to the complainant of moral damages for the Organization's lack of clarity regarding his situation and the

lingering uncertainty this had created. On 11 July 2012 the Director-General decided to dismiss the appeal in its entirety on the ground that the complainant's transfer outside the Security Service was definitive under the Organization's rules and that his actions and statements, in particular his violation of security rules and of the privileges of an FAO internal shop, had been such that it would not be appropriate to transfer him back to the Security Service. That is the impugned decision.

The complainant asks the Tribunal to acknowledge the unlawfulness of the impugned decision, the unlawfulness of the FAO's behaviour, which forced him to resign before his statutory retirement date of 7 January 2014, and that the decision to reject his request for a transfer back to the Security Service was taken in retaliation for having exercised his right of appeal. He requests the Tribunal to quash and declare null and ineffective the impugned decision and to order his transfer back to the Security Service retroactively for the period from 25 March 2009 until 7 January 2010, the effective date of his resignation. He also requests the Tribunal to order that his career be reconstructed for the abovementioned period with all consequences that attach to such an order.

He seeks an order that the FAO pay him the service differential and all other sums to which he would have been entitled if his transfer back to the Security Service had been effected from 25 March 2009 until 7 January 2010, together with interest, as well as an order that it pay him his pension contributions for the aforementioned period, taking into account the service differential and all other sums he would have received, including any additional amount requested by the United Nations Joint Staff Pension Fund owing to the delay.

He claims in material damages: i) a sum equal to the difference between the salary that he would have received as Assistant Security Supervisor, at grade G-4, from 7 January 2010 until 7 January 2014 and the pension he will actually receive during that period; ii) a sum equal to the difference between the pension he would have received if he had retired on 7 January 2014 as an Assistant Security Supervisor, at grade G-4, and the pension he will actually receive from 7 January

2014 up to the age of 75; iii) 30,000 euros for professional damage, or another amount considered fair by the Tribunal; iv) 20,000 euros for the damage to his reputation, or another amount considered fair by the Tribunal; and v) 30,000 euros for the loss of opportunity to be promoted to a G-5 post of Security Supervisor, or another amount considered fair by the Tribunal. He also claims 50,000 euros in moral damages or another amount considered fair by the Tribunal. He requests that the FAO be ordered to publish in its Newsletter that his claims have been granted and the content of the Tribunal's judgment and that he be awarded the cost of the internal appeals proceedings and the proceedings before the Tribunal.

In its reply the FAO invites the Tribunal to reject the complainant's claims in their entirety.

CONSIDERATIONS

1. The complainant was transferred on medical grounds from his post as Assistant Security Supervisor, at grade G-4, in the Security Service Division (hereinafter "the Security Service"), to the post of Stock Control Clerk, at grade G-4, in the Infrastructure and Facilities Management Service (AFSI) with effect from 7 January 2008. He contested this transfer in an appeal filed with the Appeals Committee on 7 May 2008 (appeal No. 605). In its report dated 19 March 2009, the majority of the Committee members held that there was nothing to suggest that the FAO had not observed the prescribed procedures for transfer. They considered that the decision had been properly motivated and that the concerns raised by the complainant had been taken into account. They found that the FAO had acted in the complainant's interest by identifying an alternative post for him instead of terminating his contract for health reasons and they recommended that the appeal be rejected as unfounded on the merits, and that the claims relating to harassment and compensation be rejected as irreceivable. In a letter dated 18 June 2009, the Director-General endorsed this recommendation, thus rejecting the complainant's appeal. The complainant impugned that decision in his second complaint

before the Tribunal, which led to Judgment 3022, in which the complaint was dismissed in its entirety.

2. On 25 March 2009 the complainant asked the Director of the Human Resources Management Division (AFH) to transfer him back to his previous post in the Security Service on the basis that he had recently been declared "medically fit for duties as a guard". They then met on 29 April 2009 to discuss the matter and the Director of AFH informed the complainant that his request would likely not be granted due to his service record, but that a definitive decision would be given as soon as possible. The complainant received a memorandum dated 2 October 2009 from the Director of AFH referencing the complainant's request of 25 March and the discussion held at the 29 April meeting and informing him that there were no available positions in the Security Service at that time which would match his qualifications and experience but that he could apply for any eventual vacant posts and his application would be duly considered in light of his relevant experience and service record. In that memorandum the Director of AFH also noted that rather than terminating the complainant's appointment for health reasons pursuant to Manual paragraph 314.2.3, when his sick leave on full pay was exhausted, the Administration transferred him to the position in AFSI with effect from 7 January 2008, in accordance with Manual paragraph 311.4.12. The complainant appealed the decision contained in the memorandum of 2 October 2009 and received a response dated 21 December 2009, in which the Assistant Director-General of the Department of Human, Financial and Physical Resources (ADG/AF) noted that the Director-General's decision of 18 June 2009 addressed only the complainant's transfer to AFSI and did not constitute an implied decision regarding the complainant's request to be transferred back to the Security Service. He further noted that the complainant had not put forward any evidence in support of the assertion made in his appeal that the 2 October 2009 decision was "redundant", "irrelevant", and "[could] not constitute the Organization's decision on [his] request of 25 March 2009". He went on to note that the delay in responding to the complainant's 25 March request was due to the complex nature of "the ongoing issues" in the complainant's

case of which the complainant had been advised by the Director of AFH at the 29 April meeting. The complainant was reminded that he was advised by memorandum of 23 November 2007 that the Assistant Director-General of AF had decided to transfer him to the post of Stock Control Clerk in AFSI, pursuant to Manual paragraph 311.4.12, and that the transfer was definitive, i.e. it was not only temporary or until the staff member was 'medically fit' to return to his former duties. In conclusion the complainant's appeal was "dismissed as without merit" and he was informed that he was not permitted to apply directly to the Tribunal but he could impugn the decision in an internal appeal with the Appeals Committee in accordance with the relevant rules.

3. On 25 January 2010 the complainant appealed to the Appeals Committee the decision to refuse his request to be transferred back to his previous post in the Security Service (appeal No. 624), on the grounds that he had a "legitimate expectation to be retransferred to [his] former post or, in any case, to [the Security Service] as soon as [he] had been declared fit for duties as a guard by the Chief Medical Officer". He claimed that no vacancy for his post in the Security Service should have been advertised or filled until a year had passed and his health had been re-evaluated. He also claimed that the 2 October 2009 decision was not a proper administrative decision, that it did not directly answer or provide reasons for the rejection of his request to transfer him back to the Security Service, that it was a hidden disciplinary measure based on errors of fact and law and that it was "belated". In its report dated 6 March 2012, the Appeals Committee recommended that the appeal be rejected for the most part as unfounded. It nevertheless endorsed the complainant's claims regarding the delays and the lack of clarity on the part of the Organization, which the Appeals Committee considered to "constitute a violation of the Organization's duty of care towards its staff members to prevent damage to their interests, and created a lingering state of uncertainty causing moral suffering". It consequently recommended the payment of moral damages in an unspecified amount. In a letter dated 11 July 2012, the Director-General informed the complainant of his decision to follow the Appeals Committee's recommendations to dismiss his claims

regarding the merits of the decision dated 2 October 2009 and to reject the Appeals Committee's recommendations to offer him compensation for moral damages due to procedural issues, on the grounds that these are not well founded.

4. In the present complaint the complainant impugns the decision of 11 July 2012, claiming that it is unlawful because it confirmed the earlier decision of 2 October 2009, which was belated and did not fulfill the formal or substantive requirements of an administrative decision. He also claims that the FAO violated the principle of good faith and its duty to inform him; that the decision to reject his request to be transferred back to his previous post in the Security Service was not properly justified; that the impugned decision was tainted by errors of fact and law and misuse of authority; that it constituted a hidden disciplinary measure; that it was contrary to the Organization's interests; and that in refusing to transfer him back to the Security Service, the FAO violated the principle of double jeopardy.

5. The complainant raises the issue of receivability with regard to the Organization's reply but, as the Registrar had granted an extension of the time limit for filing the reply, the Tribunal will not address this matter further.

6. The Tribunal observes that the memorandum of 23 November 2007, notifying the complainant of the decision to transfer him to the post of Stock Control Clerk in AFSI, specified that the transfer was organised as an alternative to termination of his appointment for health reasons, in accordance with Staff Rule 302.9.22.

Staff Rule 302.9.22 deals with "Termination for Health Reasons" and reads as follows:

> "Physical or Mental Limitations. The appointment of staff members who have neither attained the mandatory age of retirement established in the Staff Regulations nor become incapacitated for further service, but who have physical or mental limitations which render them unable to perform the duties currently assigned to them, may be terminated at any time if no other post commensurate with their professional qualifications and current health condition is vacant within the Organization."

7. The Tribunal finds no ambiguity in the text of the 23 November 2007 decision or in the Staff Rule cited therein. There is no indication that the transfer was temporary or that the complainant could expect to return to his post if his health improved. Further, in the e-mail to the complainant from the Director of AFH, dated 19 February 2008, it was noted "[i]n my memorandum of 28 December 2007, I informed you that based on the medical advice received as of that date, there appeared to be no grounds for reversing the decision to transfer you. Rather, given your medical condition, the decision appeared to be in your interest." It also stated that the latest medical certificate, which said that the complainant could resume his duties, had been noted but "you will appreciate that it is for the Organization to assess the administrative aspects, i.e. whether from the viewpoint of an employer, it is considered responsible to allow your immediate return to your former duties in [the Security Service] in light of the relatively extended and very recent period until which you were certified to have been suffering from a medical condition making you unfit to perform your former duties. I am advised it is standard practice in the Organization, for staff members who have suffered from medical conditions similar to yours, that a period of gradual re-adaptation to the working environment be allowed for, in order for all parties concerned to be certain that your return to work does not pose a health risk, at which point the administrative situation can be reassessed." The Tribunal finds the wording to be precise and unambiguous and rejects the claim that it could have led the complainant to legitimately expect to be automatically transferred back to his former post upon proof that he was medically fit for duty as a guard. The wording explains that an administrative reassessment could be done only following a period of "gradual re-adaptation" and the Tribunal holds that the term "reassessment" does not convey any automatic right of return for the complainant. Furthermore, the Tribunal notes that the complainant did not formally contest the vacancy announcement published in October 2008 for the three G-4 posts as Assistant Security Supervisor, which included his former post in the Security Service. The complainant did not ask the Organization for clarification on which posts were included in the vacancy

announcement and the Organization had no obligation to personally inform him that his former post had been advertised. Not having challenged that vacancy announcement in accordance with the relevant rules and time limits, he cannot now raise the issue of the temporariness of his transfer. The vacancy announcement confirmed that his transfer was not temporary and, as it went uncontested, it has since become immune to challenge. The complainant applied for the G-5 post advertised in the Security Service but he did not apply for the three G-4 posts.

8. In Judgment 3022, under 9, the Tribunal noted in relevant part that "[c]onsidering the medical certificates taken as a whole, the exigencies of the post of Assistant Security Supervisor, and the numerous interactions between the complainant and the Organization, it appears that the conclusion reached by the Organization (i.e. to transfer the complainant to a post commensurate with his state of health for a period of readjustment prior to reassessing his suitability for a possible transfer back to his previous position) was not unreasonable".

9. Following the complainant's request of 19 January 2009 to the Chief Medical Officer that his case be reconsidered, the latter advised the complainant in an e-mail to set up an appointment "in order to initiate the medical review" of his case. In a memorandum of 21 March 2009 to the Director of AFH, the Chief Medical Officer wrote that consequent to his previous memorandum of 11 October 2007, the complainant was transferred to a post "commensurate with his medical condition" and that in an exchange of e-mails he had "clarified to [the complainant] his status and when his medical condition could be reviewed". The Chief Medical Officer noted that the complainant had since been "fully investigated by the relevant specialists" and that he had reviewed the examinations and reports and had also seen the complainant himself on several brief consultations and had thus concluded that he considered the complainant "now medically fit for duties as a guard". The Tribunal finds the wording of the Chief Medical Officer's e-mail to the complainant unambiguously informed him that the former would do a "medical review" of his case.

The complainant could not reasonably take that to mean that it would include an automatic transfer back to his previous post, which would require an administrative review. Furthermore, the memorandum stating that the complainant was considered "medically fit for duties as a guard" could only serve to satisfy the basic requirement of fitness, which is relevant in assessing whether or not it could be considered appropriate to allow the complainant to apply for posts in the Security Service.

10. The complainant asserts that the decision of 2 October 2009 did not fulfill the formal or substantive requirements of an administrative decision. The Tribunal observes that in this decision the Director of AFH noted the complainant's request to be transferred back to the Security Service, cited the rules under which the complainant's transfer to AFSI had taken place, and considered the assessment of the Chief Medical Officer that the complainant was "medically fit for duties as a guard". However, the Director of AFH explained that there were currently no available positions in the Security Service that would match the complainant's qualifications and experience. He informed the complainant that, as he had been found medically fit for duties as a guard, he could apply for any eventual posts in the Security Service and that his application would be "duly considered in the light of [the complainant's] relevant experience and service record". The Tribunal finds that the 2 October 2009 memorandum constitutes a proper decision, fulfilling all the formal and substantive requirements of a reasoned administrative decision. The memorandum essentially specified that three administrative requirements were needed in order to continue with the "administrative reassessment" of the complainant's situation; first, that a vacant post in the Security Service would have to be identified; second, that he would have to apply for that post; and third that his application would be considered in light of his experience and service record. As the first requirement could not be fulfilled at that time, it was sufficient for the Director of AFH to only treat the lack of vacant posts as the justification for the implicit rejection of the complainant's request for a transfer to the Security Service at that time.

11. With regard to the claim that the decision of 2 October 2009 was "belated", the Tribunal finds it useful to consider the timeline of events that occurred in the period prior to the decision. On 22 April 2009, soon after the Chief Medical Officer declared him "medically fit for duties as a guard", the complainant lodged an appeal against a separate decision (dated 20 March 2009) confirming the decision to suspend him without pay for two months as a disciplinary sanction regarding his conduct in 2007 (see Judgments 3021 and 3184). On 29 April he met with the Director of AFH, as mentioned above, and was informed that it was unlikely that his request to transfer to the Security Service would be granted. This is confirmed in paragraph 29 of the complainant's appeal (No. 624), as annexed to the FAO's reply, where the complainant acknowledged that "[d]uring the meeting held on the following 29th April [the Director of AFH] told me that he thought he would not grant my request to be re-transferred to the Security [Service], but I would receive the decision as soon as possible". The complainant applied for the G-5 post of Security Supervisor which was announced in July 2008; he was interviewed for the post in February 2009 and, while his application was duly considered by the General Service Staff Selection Committee on 27 May 2009, he was not selected. The complainant received the Director-General's decision, dated 18 June 2009, rejecting his appeal (No. 605) and confirming his transfer to AFSI, in accordance with the majority opinion of the Appeals Committee. A meeting was held on 6 August 2009 between the ADG/AF, the Director of AFH, the Chief of CSHL, the Senior Officer (Staff Relations) of AF and the General Secretary of the Union of General Service Staff to discuss the options available to the complainant, including a possible agreed termination. On 16 September 2009 the complainant filed his second complaint with the Tribunal, impugning the decision to confirm his transfer to AFSI. Considering the activity in the period from March to October 2009, considering that the matter was complex and was being treated as thoroughly as possible by the FAO, in these specific circumstances, the delay was not unreasonable. As the complainant's challenges to the disciplinary measures were ongoing during this period and the final administrative decision on these measures was

taken on 17 September 2010, after the conclusion of the internal appeals procedure (18 March 2010), the FAO was right not to include the complainant's negative service record as a justification for its 2 October 2009 decision against his request for a transfer.

12. The complainant claims that the FAO violated the principles of good faith and the duty to inform by leading him to believe that his transfer to AFSI was temporary and that he would be re-transferred to the Security Service once his health had improved. He asserts that, if there is no internal rule regulating a right to return following a period of temporary assignment for health reasons, then Italian law should apply. He also asserts that the various reasons given as justification for the rejection of his request (i.e. the need for a period of gradual readjustment prior to a new medical reassessment; the lack of vacant posts; and his service record) show that the FAO failed to properly inform him of the true reason for the rejection of his request. The Tribunal finds that the Organization's correspondence could not be construed in the way the complainant suggests and that the Appeals Committee's reasoning in his favour in that regard is not sound. With regard to his claim that in absence of an internal rule regulating the right of return for transfers for health reasons, the FAO should be obliged to follow Italian national law, the Tribunal points out that Italian law is not applicable to the employment relations of the FAO and its staff. With regard to the claim that he was led to believe that his transfer to AFSI was temporary, as noted above, the Tribunal finds that it is clear from the relevant rules cited above, the wording of the transfer decision and the follow-up communications that the transfer was not temporary. Moreover, the respective reasons given by the FAO in its decisions of 2 October 2009, 21 December 2009 and 11 July 2012 were appropriate at the respective times of those decisions. The first hurdle to be overcome was that a medical reassessment was necessary following a one-year period of gradual readjustment. Once that had been done, the administrative possibility of a transfer had to be assessed (i.e. whether there were any vacant posts available at the time, following the successful medical reassessment). There was no such availability at the time of the decision taken on 2 October 2009.

In reviewing that decision it was logical for the ADG/AF to explore the situation more fully when confirming the 2 October 2009 decision. Such an administrative assessment of the managerial appropriateness of transferring the complainant to any post in the Security Service was in the Organization's interest and cannot be considered inappropriate.

13. In the impugned decision, dated 11 July 2012, the Director-General explained why he could not accept the finding of the Appeals Committee that the complainant was unaware that his potential transfer to the Security Service would be difficult. He mentioned the meeting of 29 April 2009 in which the Director of AFH informed the complainant that while his health may have permitted him to carry out the duties of a guard, his actions and statements had been such that the Organization was not able to consider it appropriate to transfer him to a post of guard in the Security Service. The Director-General specified that in that meeting, the Director of AFH had referred to the complainant's violation of security rules and the privileges of an internal shop and his aggressively defensive approach, which included the serious and unfounded allegations he had made against the integrity and management of the Security Service. The Director-General mentioned this only to establish the fact that "[the complainant was] fully aware, as a result of [his] discussions with the Director, AFH, that [his] service record posed significant hurdles for [his] renewed employment in [the Security Service]". The Tribunal holds that the expression "aggressively defensive approach" was not referring to the complainant's right to appeal but was simply indicating that the unfounded accusations (i.e. tampering with the video footage from the surveillance camera in the internal shop), which had been disproven by the external expert, had offended the Security Service staff and that this objectively represented an obstacle to his transfer back to the Security Service.

14. The Tribunal finds that the final decision of 11 July 2012 was clear and properly substantiated. The Director-General accepted the Appeals Committee's recommendation to dismiss the complainant's claims regarding the merits of the 2 October 2009 decision and

justified his rejection of the recommendation to offer the complainant compensation for moral damages. The rejection of the complainant's request for a transfer back to the Security Service was based also on his service record, which negatively affected his ability to be reintegrated in that Service, and which was therefore a legitimate reason. The complainant violated rules which he was supposed not only to follow as a staff member, but also to enforce as an Assistant Security Supervisor. The Tribunal is satisfied that the complainant could reasonably have been aware that his service record posed significant hurdles for his re-integration into the Security Service and that it was sufficient to justify the decision not to transfer him back to that Service. Such a decision cannot therefore be considered illogical or unreasonable.

15. The complainant claims that the rejection of his request to be transferred to a post in the Security Service is a hidden disciplinary sanction and violates the principle of double jeopardy. The Tribunal rejects that claim as unfounded. The rejection of his request for a transfer is an administrative decision that was properly taken in the interest of the Organization. Thus, it also follows that this decision cannot be considered to violate the principle of double jeopardy, as it was an organizational measure and not an administrative or disciplinary sanction. In light of the above, the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 22 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ