

**A. (No. 2)**

**v.**

**FAO**

**129th Session**

**Judgment No. 4227**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr K. A. against the Food and Agriculture Organization of the United Nations (FAO) on 19 September 2018, the FAO's reply of 3 December 2018, the complainant's rejoinder of 29 January 2019 and the FAO's surrejoinder of 11 April 2019;

Considering Articles II, paragraph 5, and VII 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 challenges the decision to dismiss him for misconduct.

The complainant is a former staff member of the World Food Programme (WFP) – an autonomous joint subsidiary programme of the United Nations and the FAO. At the material time, he was serving as Deputy Country Director in WFP's Country Office in the Democratic Republic of the Congo. In August 2013 the Office of Inspections and Investigations (OIGI) initiated a preliminary investigation into allegations of misconduct against the complainant. OIGI concluded that there was a legitimate basis to warrant a full investigation.

On 17 July 2014 the complainant was interviewed by OIGI. In its report of 30 September 2014 OIGI found that the complainant had engaged in misconduct in that he had violated the WFP procurement rules, that he had used his official position for the benefit of a private company owned by his friend and that he had engaged in fraudulent misrepresentation and actions giving rise to a conflict of interest. Based on its findings and conclusions, OIGI recommended that appropriate administrative or disciplinary actions be taken against the complainant.

On 6 March 2015 the complainant was informed by the Director of the Human Resources Division (HR) that on the basis of the findings of OIGI, disciplinary proceedings were being initiated against him. Having regard to the proposed disciplinary measure, the Director of HR concluded that, if confirmed, his conduct warranted a “severe response” pursuant to WFP’s policy of zero tolerance for fraud, corruption and collusive practices. On 28 April the complainant submitted his response, denying the charges made against him.

On 15 October 2015 the Director of HR informed him that WFP had decided to apply to him the sanction of dismissal, with compensation in lieu of notice and without termination indemnities, on the grounds that the evidence was sufficient to confirm the charges and that there were several aggravating factors, including that the complainant held a senior position, that the misconduct had occurred in the context of procurement activities where the perception of preferential treatment may harm the image of the organization and that the complainant had placed outside interests above those of WFP. As a result, he was separated on 22 October 2015.

On 13 January 2016 the complainant lodged an appeal with the WFP Executive Director challenging that decision. As his appeal was rejected on 14 March 2016, the complainant appealed before the FAO Appeals Committee on 3 May 2016.

In its report of 19 June 2018 the Appeals Committee, which held a hearing with the complainant, recommended that the appeal be dismissed in its entirety. By a letter dated 22 June 2018 the complainant was informed that the FAO Director-General concurred with the Appeals

Committee's findings and recommendation and that he had decided to dismiss his appeal in its entirety. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to award him moral damages, as well as costs. He states that his second complaint should only be examined if the Tribunal finds his first complaint to be irreceivable.

The FAO concurs with the complainant's request that the present complaint be considered only if the complainant's first complaint is found to be irreceivable. In the event that the first complaint is found receivable, it asks the Tribunal to join the two complaints as they present the same material facts and claims. It has no objection to the receivability of the second complaint, but argues that the complainant's claim concerning the overall duration of the investigation is irreceivable for failure to exhaust internal remedies. On the merits the FAO asks the Tribunal to dismiss the complaint as entirely unfounded.

#### CONSIDERATIONS

1. The complainant's employment with WFP was terminated in October 2015 as a result of negative findings against him in disciplinary proceedings initiated earlier that year. He unsuccessfully appealed to the WFP Executive Director and, on 3 May 2016, lodged an appeal with the FAO Appeals Committee. The Appeals Committee issued a report dated 19 June 2018 recommending the dismissal of the appeal. The ensuing decision of the FAO Director-General of 22 June 2018 to dismiss the appeal is the subject of this second complaint filed on 19 September 2018.

2. The disciplinary proceedings were formally initiated by a memorandum dated 6 March 2015 to the complainant from the Director of HR. The memorandum set out the background, the findings of OIGI arising from its investigation, a consideration of whether there was credible *prima facie* evidence to support the allegations that the complainant engaged in misconduct and the conclusion and charges. The identified charges were that the complainant:

- a. Violated the procurement rules and improperly used [his] official position to the benefit of a third party in connection with the procurement of goods and services from [a private company] for an overall amount of [United States dollars] 269,577. These allegations concern conduct of procurement activities in relation to both [purchase orders], released on 7 June and 15 July 2011, respectively;
- b. Engaged in fraudulent misrepresentation by knowingly providing incorrect information to the Regional Bureau for Eastern and Central Africa [...] to induce endorsement of the waiver of the competitive procurement process and direct purchase of goods and services from [the private company] (for an amount of [United States dollars] 171,037); [and]
- c. Engaged in actions giving rise to a conflict of interest, by participating in the purchase of products from an individual with whom [the complainant] held a close personal relationship.”

3. In his pleas, the complainant challenges both procedural aspects of the course the investigation and disciplinary processes against him took as well as a number of the findings made against him. It is convenient to commence by focusing on one aspect of the case against him. The gravamen of the case was that the complainant held a senior position of Deputy Country Director in the Democratic Republic of the Congo Country Office, he was a friend of Mr O.-T. who had recently left employment with WFP, Mr O.-T. procured, through a recently established company, a contract to supply electronic devices to the organization, this happened without a tender process and the administrative decision to procure the goods without tender was made, in part, on the basis of misleading information provided by the complainant in a request for waiver. If, in fact, Mr O.-T. was a friend of the complainant, then even only focusing on the uncontroverted sequence of events, it would be difficult to view the conduct of the complainant benignly and it could much more readily be inferred that the complainant acted improperly if not unlawfully. Thus the question of whether Mr O.-T. was a friend of the complainant was an important factual issue and it is tolerably clear the complainant was aware of this from the outset of the disciplinary proceedings against him and continued to be aware of it in the proceedings before the Tribunal.

4. On 17 July 2014 two investigating officers of OIGI conducted an extensive interview with the complainant. The transcript comprises 133 pages and, it appears, the interview took the whole day. Towards the beginning of the interview, the two investigating officers explored the question of the nature of the relationship between Mr O.-T. and the complainant. By and large the questions were open-ended and the complainant was afforded the opportunity to answer unconstrained by the form the question took. The questioning started with the observation: “Let’s discuss [...] the relationship between yourself and [Mr O.-T.]. How would you describe your relationship with [Mr O.-T.]” In the ensuing answers, the complainant initially described Mr O.-T. as a friend and that he had got to know him very well in Rome. He later described Mr O.-T. as a “good friend”, that he was “still my friend”, again described him as a “good friend” and ultimately as a “really good friend of mine”. These answers pointed, unambiguously, to a close personal and friendly relationship between the complainant and Mr O.-T. and it was open to the defendant organization to act on the basis there was.

5. In the complainant’s subsequent narratives concerning the allegations against him, there is an obvious and implausible retreat from what he said during the interview and obfuscation about the relationship. For example, in his brief in these proceedings the complainant says:

“The constant citing by WFP of [Mr O.-T.] as a ‘really good friend’, including in the [Executive Director’s] response to the complainant’s appeal is a demonstration of the continuous bias by the Organisation to justify the unjustifiable through the presumption and perception of a conflict of interest. It is clear that Mr O.-T. was known by many WFP staff by virtue of having himself worked at WFP in senior management positions around the world. The Organisation demonstrated this bias from the outset when in both the Investigation report and Charge memo WFP added the phrase ‘a fellow Ghanaian’ to describe the relationship between [Mr O.-T.] and the complainant.”

6. The role of the Tribunal in a case such as the present, in relation to the question of whether the alleged conduct took place, was summarised in Judgment 3862, consideration 20. According to the well-settled case law of the Tribunal, the burden of proof rests on an organisation to prove allegations of misconduct beyond a reasonable

doubt before a disciplinary sanction can be imposed (see, for example, Judgment 3649, consideration 14). It is equally well settled that the “Tribunal will not engage in a determination as to whether the burden of proof has been met, instead, the Tribunal will review the evidence to determine whether a finding of guilt beyond a reasonable doubt could properly have been made by the primary trier of fact” (see Judgment 2699, consideration 9).

7. In its report, the Appeals Committee, whose reasoning the Director-General adopted in substance in the impugned decision, characterised the events surrounding the request for waiver as a “pivotal piece of evidence”. Its analysis of those events and conclusions about them contained several elements. They included the issue of whether other options were available on the market and the business linkages between the owner of the technology and the private company established by Mr O.-T. Both issues could have been adequately addressed by not requesting a waiver for the procurement actions, in that the competent internal body would have taken over, absolving the complainant of the responsibility of looking further into these matters. In addition, the complainant started to deliberately construct and report facts to obfuscate the judgement of the internal body considering the waiver when presenting arguments which were framed to sidestep legitimate questions. This evidence demonstrated the complainant’s lack of due diligence which was exacerbated by the fact that he had previously been the Director of Audit, aware of procurement procedures and the risk of reputational damage.

8. These conclusions were available on the evidence at the requisite standard (particularly having regard to the analysis in the “Reply of the Programme” dated 3 October 2016 submitted to the Appeals Committee including, specifically, changes favouring Mr O.-T.’s company made by the complainant to a draft procurement waiver request prepared by a subordinate), as was the overarching conclusion that the conduct of the complainant was misconduct which warranted dismissal.

9. In his brief, the complainant raises four procedural or related issues in challenging the impugned decision. The first concerns the duration of the investigation process. The second involves a contention that the complainant was not provided with all the evidence collected by OIGI in order to enable him to mount his defence. The third is that not all those who should have been interviewed were in fact interviewed. The fourth is that during the investigation and disciplinary process the allegations against him shifted. The Tribunal considers each of these arguments in turn.

10. The first procedural ground concerns the duration of the investigation process. The complainant argues in his brief that “the duration of the investigation process went far beyond a reasonable time to guarantee due process”. In its reply the defendant organization makes the point that the complainant does not specify how the duration of the investigation allegedly impacted upon his due process rights. The complainant does not, in his rejoinder, provide those particulars. It is by no means obvious that the time taken, which was lengthy, affected the complainant’s capacity to defend the charges or otherwise prejudiced his position. This contention should be rejected.

11. The second procedural ground raised by the complainant involves a contention that he was not provided with all evidence collected by OIGI in order to enable him to mount his defence. The defendant organization’s response in its reply is twofold. Insofar as the complainant’s grievance was that some of the documents (transcripts of interviews) he was given were redacted, the redacted information related to another investigation and was not at all relied upon in consideration of the charges against the complainant. In the circumstances of this case, there is no basis for the Tribunal to doubt this is correct. The second element of the response is that, to the extent that the complainant points to the fact that he was not given 11 transcripts of interviews until after the disciplinary measure of dismissal was imposed, the defendant organization says they were not relevant to the decision to dismiss him. The complainant had all relevant transcripts when pursuing his appeal to the WFP Executive Director and the FAO Appeals Committee and

he did not then demonstrate, nor has he in these proceedings before the Tribunal, that those 11 transcripts were or even may have been relevant to the decision to dismiss him. Accordingly, this ground should be rejected.

12. The third ground is that not all those who should have been interviewed were in fact interviewed. The complainant identifies five such people. The defendant organization points to the fact that he did not proffer the names of these five people when asked towards the conclusion of his interview on 17 July 2014 whether there was anyone else the investigating officers should speak to and also says, correctly, the complainant has failed to demonstrate that the decision not to interview these five people flawed, in a material way, the investigation process.

13. The fourth of the complainant's procedural grounds is that during the investigation and disciplinary process the allegations against him shifted. While the focus of the factual foundation of the charges varied during the entire process, the substance of the charges remained constant. This is not a case analogous to that arising in Judgment 4063.

14. The complainant's challenge to the impugned decision based on procedural flaws in the investigation process must be rejected. As the complainant has not demonstrated that the decision to dismiss him was flawed on either substantive or procedural grounds, his complaint should be dismissed.

15. One final matter should be addressed. The complainant seeks moral damages by reference to the time taken for the investigation process (over one and a half years) as well as the time taken to finalise the internal appeal process (over two and a half years). It may be accepted that both periods were extremely lengthy. However, the explicit basis for the damages is said to be "the enormous distress suffered by the complainant". This is but an assertion not founded on any evidence of a causal connection and it is more likely that any distress suffered by the complainant over this time arose not because of the length of time the steps took but rather from the fact that the defendant organization was consistently satisfied at several levels of decision-making and review that the decision to dismiss the complainant for serious misconduct was justified.



DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 7 November 2019, Ms Dolores M. Hansen, Vice-President, Mr Michael F. Moore, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

MICHAEL F. MOORE

YVES KREINS

DRAŽEN PETROVIĆ