

M. (No. 3)

v.

FAO

136th Session

Judgment No. 4692

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr A. M. against the Food and Agriculture Organization of the United Nations (FAO) on 16 August 2019 and corrected on 19 September, the FAO's reply of 7 January 2020, the complainant's rejoinder of 14 April 2020 and the FAO's surrejoinder of 20 July 2020;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainant challenges the rejection of his appeal against an implied decision not to respond to a complaint he had lodged with the Office of the Inspector General (OIG).

The complainant joined the FAO in July 1995. He held the position of Director of the Liaison Office for North America (LOW), at grade D-1, from 1 January 2015 to 9 September 2016.

On 26 June 2017, the complainant submitted a complaint to the OIG for investigation of his "unlawful replacement" with Mr S., effective 1 December 2016, following his "retaliatory and unlawful eviction from his position as Director, LOW".

On 1 February 2018, he sent a letter of grievance to the Director-General, objecting to the “inordinate delay” and lack of response from the OIG, which he perceived as evidence of an implied decision not to respond to his complaint. The complainant alleged that he “received no single communication” from the OIG for more than seven months, and that “the silence of the OIG was an implied decision or determination [...] which allowed him to contest it through the internal procedure”. This grievance was rejected on 2 April 2018 as being irreceivable *ratione materiae*, on the basis that there was no administrative decision taken which might represent the basis for the lodging of a claim, as foreseen in Staff Rule 303.1.311. The complainant’s allegations of “the lack of total response” and “the extremely inordinate time already taken” were not considered as administrative decisions. Furthermore, the timeframe of 120 working days stipulated in the FAO Guidelines for Internal Administrative Investigations by the OIG in relation to the completion of investigations was expressed to be simply an expected approximation, and not a deadline or expiry date. Lastly, the complainant’s challenge to the appointment of Mr S. as Director of FAO LOW, which had been announced on 19 January 2017, was held to be time-barred, having regard to the time limit specified in Staff Rule 303.1.311.

From 3 April 2018 to 17 May 2018, the complainant sent seven email requests to the Inspector-General demanding that the OIG issue the report of the investigation. He maintains that the Inspector-General did not respond to those emails. Subsequently, ten months later, a Notice of Closure was sent to what the complainant described as a non-existent email address – as he had retired in the meantime and therefore no longer used his former official email address.

On 25 May 2018, the complainant lodged an appeal with the Appeals Committee against the 2 April 2018 decision. In its report of 22 January 2019, the Appeals Committee mirrored the 2 April 2018 decision of irreceivable *ratione materiae* since “the reported delay by the OIG could not be regarded as an administrative decision proper”. In addition, the Committee recommended that the appeal be rejected as irreceivable *ratione temporis* in respect of the claims regarding the

appointment of Mr S. Furthermore, a new claim put forth by the complainant for alleged discrimination was found irreceivable for failure to exhaust internal remedies.

On 20 May 2019, the Director-General endorsed the findings and recommendations of the Appeals Committee and dismissed the appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision. He seeks moral damages including excessive delay in the amount of 300,000 euros, compensation for material damage he suffered due to interruption in career advancement in an amount of not less than 200,000 euros, and exemplary damages in an amount of not less than 300,000 euros. He further seeks reimbursement of all legal fees, and interest on all amounts awarded at the rate of 5 per cent per annum.

The FAO asks the Tribunal to dismiss the complaint as irreceivable *ratione materiae* and *ratione temporis*. In addition, it asks the Tribunal to disregard the claim for exemplary damages because the complainant did not raise it during the internal appeal process.

CONSIDERATIONS

1. At relevant times, the complainant was a member of the staff of the FAO. In August 2016, he was informed of a decision to transfer him to South Africa, pending reassignment to Botswana. On 10 September 2016, he was transferred, for administrative purposes, to a post in the Sub-Regional Office for Southern Africa, at the duty station Harare, Zimbabwe. He was, at the time, stationed in Washington, DC, United States of America, and working as the Director of the FAO Liaison Office for North America (LOW).

2. By a bulletin of 19 January 2017 from the Director-General, it was announced that Mr S. had been appointed Director of the FAO LOW effective 1 December 2016. The bulletin noted that Mr S. “succeed[ed]” the complainant in the position. By letter dated 26 June 2017, the complainant wrote to the Office of the Inspector General (OIG). The specific subject matter of his letter was identified as the “actions taken

by the FAO in first removing then replacing [him] as Director [of the FAO LOW]”. The letter is 13 pages long and traverses a multitude of serious allegations concerning the complainant's treatment at the hands of mainly other senior officials within the Organization and much of which is detailed background culminating in his “removal”. The complainant was plainly inviting the OIG to investigate his “removal and replacement”.

3. On 1 February 2018, the complainant wrote to the Director-General seeking to appeal under Staff Rule 303.1.311 against “the lack of total response from the OIG, together with the extremely inordinate time already taken [more than seven months] in regards to [the] Complaint of Unlawful Replacement following Retaliatory and Unlawful Eviction from Post”. By letter dated 2 April 2018, the complainant received a response on behalf of the Director-General. Two things were said which are presently relevant. The first thing said was that the “OIG has confirmed that [the complainant’s] complaint alleging wrongdoing of the Organization is currently under investigation” and he “[would] be informed once the investigation [was] concluded”. The second thing said was that the complainant “[had not referred] to any administrative decision that is in conflict with the terms of [his] appointment or with any Staff Regulation, Staff Rule or administrative directive” and, “on that basis, [his] appeal [was] considered not to be receivable as it does not comply with the statutory requirements of Staff Rule 303.1.311”.

4. On 25 May 2018, the complainant lodged an appeal with the Appeals Committee. It reported on 22 January 2019 concluding that the appeal was irreceivable having regard to Staff Rule 303.1.311 (which provides for an appeal against “an administrative decision”), that is to say, it concluded there was no relevant administrative decision. Insofar as his appeal concerned the appointment of Mr S., the Committee concluded it was time-barred and insofar as his appeal concerned alleged discrimination against him, it concluded he had not exhausted internal remedies. The same approach was adopted by the Director-General when dismissing the appeal by letter dated 20 May 2019 which is the decision impugned in these proceedings.

5. In his brief the complainant argues, among other things, that there was an implied decision by the OIG to reject his grievance and he was entitled to challenge, by way of internal appeal, this implied decision. He cites Judgment 3089, consideration 7:

“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.”

6. It is true that in his communication to the Director-General of 1 February 2018 and also in his notice of appeal of 25 May 2018, the complainant stresses at length the time that had elapsed since 26 June 2017 and the rules relating to a preliminary investigation by the OIG including time frames. However, at no point does he characterise the subject matter of his appeal in terms of an implied decision rejecting his grievance. Indeed, it would have been difficult for him to do so in view of what he was told in the letter of 2 April 2018, in a summary way, of the OIG’s active consideration of his grievance. There was no objective basis on which he could have rejected what he was then told. His preference was to treat the “inaction” of the OIG as part of what, in substance, was a conspiracy among senior officials of the Organization to damage his standing and reputation.

7. The Appeals Committee and the Director-General were entitled to conclude that the matter before them did not involve an appeal from an administrative decision and were entitled to treat the appeal as irreceivable.

8. However, the complainant also seeks moral damages for the length of the internal appeal. While the appeal did take a lengthy period and was ultimately resolved on the narrow basis of receivability, his case involved a detailed account of the acts of other senior officials in the Organization intended to damage his standing and reputation. His pleas would necessarily have had to have been reviewed and considered by the Appeals Committee. Accordingly, the length the appeal took was not disproportionate to the subject matter of the appeal and no moral

damages should be awarded. Furthermore, his claim for exemplary damages was not raised in the internal appeal and is therefore irreceivable.

9. The complaint should be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 18 May 2023, Mr Michael F. Moore, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ