

A.
v.
FAO

138th Session

Judgment No. 4851

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs I. A. against the Food and Agriculture Organization of the United Nations (FAO) on 16 November 2020 and corrected on 13 December, the FAO's reply of 12 March 2021, the complainant's rejoinder of 16 May 2021 and the FAO's surrejoinder of 10 August 2021;

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 terminate her appointment at the end of the probationary period.

On 23 April 2016, the complainant joined the Country Office of the World Food Programme (WFP) – an autonomous joint subsidiary programme of the United Nations and the FAO – in Yemen, to serve as a Communication Officer at grade P-3, under a two-year fixed-term appointment subject to a twelve-month probationary period, expiring on 22 April 2017.

On 6 September 2016, the complainant's immediate supervisor provided her with her six-month Probationary Performance Appraisal Report (PPAR) in which her performance was assessed as "satisfactory"

with some area of improvement required in “[e]xpedit[ing] the development of the communications strategy”. Shortly thereafter, the Yemen Country Office expressed concerns with her performance. Between October and November 2016, the complainant had discussions with her hierarchy on her performance gaps. Notably, she was reproached for having uploaded inappropriate material on the WFP’s social media accounts, thereby exposing the Yemen Operations to a reputational risk. Furthermore, she was informed that her written English language skills were deemed poor.

On 22 December 2016, the complainant was provided with a Performance Improvement Plan (PIP) in which the concerns raised in October and November 2016 were clearly detailed and target areas of improvement were flagged. She was also provided with training to address her performance gaps. On the same day, she submitted her comments on the PIP, challenging the areas in need of improvement and noting that she “was trying to do [her] best”.

On 6 February 2017, the complainant was given feedback on her PIP by her immediate supervisor, and, on 2 March 2017, she received her ten-month PPAR in which her performance was assessed as “not satisfactory”, and a recommendation was made not to confirm her appointment. The complainant submitted her comments thereon on 4 March.

On 23 March 2017, upon review of those comments, the Acting Director, Human Resources Division (HRD), informed the complainant that her probationary period had not been confirmed as “the areas of [her] performance requiring improvement [had] not improved to the expected standard”. He indicated that “the PIP and [the] final PPAR reflect[ed] significant performance weaknesses” despite the fact that she had received guidance and functional feedback from her hierarchy. He further informed her that her appointment would be terminated on that basis with immediate effect, with 30 days’ compensation in lieu of notice.

The complainant eventually separated from the WFP on 28 March 2017.

On 24 April 2017, she submitted an appeal to the Director-General challenging the termination decision on the main ground that it had been taken “for personal, political and sectarian reasons” and was not based on her performance. Indeed, she explained that her husband – a Syrian journalist, human rights activist and dissident – had made his own investigation about what had happened and had discovered that the decision to terminate her appointment was a result of “collusion” between the Senior Regional Communications Officer of the Regional Bureau in Cairo, Egypt, and the Embassy of Saudi Arabia in Egypt. She further argued that she had not been informed of the performance deficiencies prior to receiving the PIP. She therefore requested the Director-General to set aside the termination decision and to award her damages for the moral and material injury allegedly suffered. The appeal was rejected on 14 June 2017.

On 12 August 2017, the complainant’s husband lodged an appeal with the Appeals Committee on her behalf resubmitting the pleas put forward in the 24 April 2017 appeal. He blamed “the Saudi establishment for ‘chasing’ [his wife] out of her job” and refuted any argument related to unsatisfactory performance. He asked the Appeals Committee to set aside the 14 June 2017 decision, to compensate his wife for the injuries she allegedly suffered and to order the conduct of an investigation “into the scandal of the dirty Saudi intervention in the work of [the] WFP and exploiting it for its despicable political and criminal aims”.

The Appeals Committee issued its report on 18 July 2019. It expressed doubts as to the validity of the complainant’s legal representation by her husband and condemned the language and tone used by him. It nevertheless recommended by a majority that the appeal be dismissed in its entirety as unfounded. One of its members issued a dissenting opinion, dated 19 June 2019, in which he recommended that the termination decision be set aside, that the complainant be awarded material and moral damages in the total amount of six months’ salary (in lieu of reinstatement) and that the Organization be requested to provide an apology for the delay in reviewing the case.

By a letter of 14 September 2020, the complainant was informed of the Director-General's decision to dismiss her appeal as unfounded, based on the recommendation of the Appeals Committee's majority. That is the impugned decision.

The complainant asks the Tribunal to set aside the termination decision and to award her six months' salary by way of moral and material damages, as well as any other financial and moral compensation that it considers she may deserve according to the law. She further requests reinstatement into a post in another duty station. Finally, she asks the Tribunal to order the FAO to issue an apology for the delay in reviewing her case.

The FAO submits that the claims pertaining to reinstatement and the issuance of an apology are irreceivable for non-exhaustion of the internal means of redress and the Tribunal's lack of competence to grant such redress, respectively. It asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. On 23 April 2016, the complainant joined the Yemen Country Office (CO) of the World Food Programme (WFP), an autonomous joint subsidiary programme of the United Nations and the FAO, as a Communication Officer, under a two-year fixed-term appointment, subject to a twelve-month probationary period. On 23 March 2017, she was informed by the Administration that her probationary period had not been confirmed as "the areas of [her] performance requiring improvement [had] not improved to the expected standard" and that her appointment would be terminated on that basis with immediate effect, with 30 days' compensation in lieu of notice. She appealed against the decision on 24 April 2017. On 14 September 2020, the Director-General issued a final decision, dismissing her appeal as unfounded, based on the recommendation of the Appeals Committee's majority. This is the impugned decision.

2. In her brief, the complainant raises several grounds challenging the impugned decision. The first ground is that the decision was unlawful because it was based on unfounded “ridiculous allegations” that damaged her professional reputation and it was sent to her husband despite concerns about his ability to represent her. The second ground is that there was a lack of good faith on the part of the Organization because the termination decision was based on an improper motive as she had discovered illegal acts committed by her supervisors. The third ground is that the Appeals Committee refused to follow the dissenting opinion, in which one of its members recommended the award of material and moral damages, “with contempt”. The complainant also pleads that there was undue delay in the internal appeal proceedings. She requests an apology from the Organization for the delay in reviewing her case.

3. The Organization does not take issue with the receivability of the complaint to the extent that it challenges the merits of the decision not to confirm the complainant’s probationary period and to terminate her appointment and her claims for damages. However, it argues that the complainant’s claim for reinstatement is irreceivable on the ground that she did not raise it in the internal appeal process. Referring to Judgment 4215, consideration 27, the Organization also notes that the complainant’s claim for an apology for the delay in reviewing her case is irreceivable as the Tribunal is not competent to make orders of this kind.

The Tribunal accepts the Organization’s arguments on receivability. According to the Tribunal’s case law, it is well established that a complainant’s request must not exceed in scope the claims submitted during the internal appeal process (see, for example, Judgments 4522, consideration 3, 4066, consideration 4, and 4009, considerations 10 and 14). In the present case, the complainant made the claim for reinstatement for the first time before the Tribunal, requesting that she be reinstated “to another duty station out of [the Middle East, Northern Africa] Region”. This new claim, which was not raised in the internal proceedings, is irreceivable for failure to exhaust internal means of redress according to Article VII, paragraph 1, of the Statute of the

Tribunal. The complainant's request for an apology for the Organization's delay in reviewing her case must also be rejected as it is beyond the competence of the Tribunal (see, for example, Judgments 4579, consideration 12, and 4478, consideration 4).

4. Turning to the merits of the complaint, it should be recalled that, according to the Tribunal's well-settled case law, the purpose of probation is to permit an organization to assess the probationer's suitability for a position, and, accordingly, an organization's exercise of its discretion regarding decisions concerned with probationary matters, including the confirmation of appointment, the extensions of a probationary period, and the identification of its own interests and requirements, ought to be accorded a high degree of deference. However, a decision not to confirm a probationer's appointment may be set aside if it was made in breach of the probationer's contract, of the organization's own regulations and rules, or of applicable general principles of law as enunciated by the Tribunal. The general principles are intended to ensure that an international organization acts in good faith and honours its duty of care towards probationers and respects their dignity (see, for example, Judgment 4481, considerations 3 and 4, citing Judgment 3440, consideration 2). The Tribunal has also stated that, in the course of making the assessment, an organization must establish clear objectives against which performance will be assessed, provide the necessary guidance for the performance of the duties, identify in a timely manner the unsatisfactory aspects of the performance so that remedial steps may be taken, and give a specific warning where continued employment is in jeopardy (see, for example, Judgments 4748, consideration 8, 4450, consideration 3, and 4282, consideration 3).

5. At this juncture, a summary of the relevant provisions of the WFP Human Resources Manual, namely Section II.1 entitled "General Provisions Applicable to All Staff Members on Continuing, Indefinite and Fixed-Term Appointments", is useful.

6. Section II.1.9.3(a), under the heading “Probationary Period” and the subheading “Assessment of Performance”, provided that “[c]onfirmation of the appointment of staff members is dependent upon satisfactory completion of their probationary period including such elements as (i) satisfactory performance of the duties and responsibilities assigned to them”. Section II.1.9.3(b) established a three-step process for assessing the performance of probationers as follows:

- (i) within three weeks after entry on duty, the immediate supervisor discusses the job description with the probationer and provides her or him with a workplan that includes the duties to be performed or the objectives and tasks to be completed within six months;
- (ii) at the end of the sixth month after entry on duty, the immediate supervisor completes the Probationary Performance Appraisal Report (PPAR), discusses its contents with the probationer, who may request that her or his observations be attached to the report. The PPAR is sent to the Regional, Country, Division or Office Director concerned for comments, and then to the Human Resources Division or to the local Human Resources Unit in the field;
- (iii) at the end of the tenth month after entry on duty, the immediate supervisor completes the PPAR for the second review period and includes a recommendation regarding the confirmation of appointment, extension of the probationary period, or separation. Again, this second report is discussed with the probationer, who may request that her or his observations be attached to the report. The report is sent to the Regional, Country, Division or Office Director concerned in good time for an appropriate recommendation to be made before the probationary period expires.

7. In the present case, the six-month PPAR, received and signed by the complainant on 6 September 2016, indicates that a workplan was provided to her within three weeks of the fixed-term appointment. The workplan established clear objectives under 13 headings, including “[d]raft and implement communications plans and campaigns that ensure better understanding of WFP’s work in Yemen and raise

awareness about the situation in the country”, “[w]ork on raising visibility for donors inside Yemen”, and “[a]ct as a spokesperson for WFP and respond to media inquiries”. In this report, the complainant’s performance was assessed as “satisfactory”, but she was required to “[e]xpeditely the development of the communications strategy”.

8. Three months later, on 22 December 2016, a letter from the Acting Country Director in Yemen containing a Performance Improvement Plan (PIP) was sent to the complainant, the content of which read as follows:

“Further to the performance feedback discussion held between [the complainant] and the Regional Communications Officer on (1) 12 October via teleconference, (2) during the [Regional Director’s] visit to Sana’a during the third week of October and finally (3) during the Regional Communications Workshop in Luxor in early November, please find below the areas that are yet to be improved and need to be addressed immediately to increase the effectiveness of Communications in the Yemen CO.

[...]

[O]ver the past few months there seemed to be a gap in the Communications coverage in Yemen [...]

The PIP further stated that “[the complainant’s] performance is still below the level expected from [her] post and grade and needs further improvement”, identifying seven critical areas for further improvement and development, with a deadline for completion set for 20 February 2017 in the column of “Time Frame”. Among “some significant issues still need[ed] to be addressed” was the presence of multiple factual and stylistic errors in all communication materials the complainant produced and signed, as well as deficiencies in the quality of her writing media messages, which was described as “not up to the standard”. In this letter, the Acting Country Director in Yemen also drew the complainant’s attention to the areas “to be improved and [which] need[ed] to be addressed immediately to increase the effectiveness of [c]ommunications in the Yemen CO”.

9. The Tribunal is satisfied that the Organization’s decision not to confirm the complainant’s appointment, based on unsatisfactory performance at the end of the probationary period, is justified and in

accordance with its own rules as mentioned in consideration 7 above. The PIP and its content clearly indicated the concerns of the complainant's supervisors and identified the unsatisfactory aspects of her performance in a timely manner so that remedial steps could be taken. The PIP also showed that the complainant was offered training opportunities, regular guidance and support to address the deficiencies.

In the thoughtful and balanced dissenting opinion of one member of the Appeals Committee, he canvassed a range of issues including procedural issues. He concluded the complainant was not given a specific warning. Notwithstanding this express reference to an absence of warning, it is not an issue raised by the complainant in her pleas in the brief. Nor is it raised in the complainant's rejoinder notwithstanding that there is an issue addressed by the Organization in its reply. Accordingly, it is not a matter the Tribunal should address.

In any event, considering that the complainant had been informed, on several occasions, about not achieving the objectives, she must have been aware that the failure to make the necessary improvements regarding her performance at the level expected of her post by the PIP's specified date of 20 February 2017 could likely result in her appointment not being confirmed at the end of the probationary period. Unfortunately, she did not make the requisite improvements. On 2 March 2017, in the ten-month PPAR, her performance was assessed as "not satisfactory" because she had made "insufficient progress" in a number of the duties and tasks assigned to her during the review period, especially given the high level of her post.

10. The complainant also appears to allege that the Organization committed a procedural error by sending the Director-General's final decision to her husband instead of to her. The context is that her husband lodged the internal appeal with the Appeals Committee on her behalf, presenting himself as her legal representative, and his email address was the only contact information provided. When the complainant provided her email address, the final decision was also sent to her. The Tribunal finds no procedural error in this regard. The complainant's first ground of challenge is unfounded.

11. As regards the complainant's second ground of challenge pertaining to an improper motive, the Tribunal's case law states that bad faith may not be presumed and must be proved. The burden of proof is on the complainant, who shall demonstrate that there was malice, ill-will, improper motive, fraud or similar dishonest purpose (see, for example, Judgments 4505, consideration 9, and 3902, consideration 11). In the present case, the complainant did not provide any persuasive evidence to prove that the impugned decision was based on an improper motive. On the contrary, the Director-General properly considered the Appeals Committee's report and endorsed the majority's opinion, which is within his authority. The complainant's second ground of challenge is therefore unfounded.

12. The complainant argues that the Appeals Committee disregarded the dissenting opinion in favour of awarding her material and moral damages, "with contempt". However, this contention misrepresents the Appeals Committee's process as per the applicable rules. In accordance with Staff Rule 303.1.37, which stated that "[a]ny member of the Committee may have a dissenting opinion included in the report", the Appeals Committee honoured its member's dissenting view by incorporating it into the report and submitting it to the Director-General. In exercising his authority to reach the final decision, the Director-General has appropriately considered the Appeals Committee's report as a whole, including the dissenting opinion. Therefore, the complainant's third ground of challenge is unfounded.

13. Additionally, the complainant contends that there was inordinate delay in the internal appeal proceedings. She implicitly claimed for moral damages through a request for an apology, which is beyond the Tribunal's competence as pointed out in consideration 3 above. The Tribunal notes that she submitted an appeal to the Director-General in April 2017, her husband lodged an appeal with the Appeals Committee in August 2017, with the last submission being filed in February 2018, the Appeals Committee issued its report in July 2019, and the final decision to dismiss her appeal was made in September 2020. While there was delay, its existence alone does not justify the

awarding of moral damages. According to the Tribunal's well-settled case law, the amount of compensation liable to be granted under this head ordinarily depends on two essential considerations, namely the length of the delay and the effect of the delay on the employee concerned (see, for example, Judgments 4635, consideration 8, 4178, consideration 15, 4100, consideration 7, and 3160, consideration 17). As the complainant has not produced sufficient evidence to prove the effect of the delay on her, her plea on the question of delay is therefore also unfounded.

14. In light of the foregoing, the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 May 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

MIRKA DREGER