**C.**

***v.***

**FAO**

**128th Session** **Judgment No. 4176**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. C. against the Food and Agriculture Organization of the United Nations (FAO) on 26 August 2017 and corrected on 8 September, the FAO's reply of 18 December 2017, the complainant's rejoinder of 15 February 2018 and the FAO's surrejoinder of 29 May 2018;

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 joined the FAO in 1982. In December 1993 his appointment was converted to a continuing appointment.

On 28 November 2012 he was informed that his position of Mail and Distribution Clerk, at grade G-3, was to be abolished. The Redeployment Task Force (RTF) for General Service (GS) Staff, which was established to explore redeployment possibilities, considered the complainant's case but did not identify any suitable position for him. At a meeting held on 29 August 2013, the complainant was offered the option of leaving the FAO on 31 December 2013 and receiving a termination indemnity increased by 20 per cent, but he declined the offer and requested to remain employed until 6 September 2014, as this

would enable him to accumulate 30 years of contributions to the United Nations Joint Staff Pension Fund (UNJSPF). In an email of 2 October 2013, the Administration denied this request but informed him that should he decide to leave the FAO on 31 December 2013, he could opt to be placed on special leave without pay for a period of twelve months, i.e. until 31 December 2014, during which time he would have to assume all pension and medical insurance contributions, including the FAO's share. The complainant responded that same day rejecting this option and requesting that he be redeployed. New Redeployment Guidelines were adopted in September 2013 and a new RTF was constituted but this body was likewise unable to identify a suitable position for the complainant.

By a letter of 30 December 2013, the Director of the Office of Human Resources (OHR) informed the complainant that the redeployment efforts had not been successful and gave him notice of termination of his appointment effective 31 March 2014, noting nevertheless that the Administration would continue to make efforts for his redeployment until that date. By a further letter dated 24 March 2014, received by the complainant on 25 March, the Director of OHR confirmed that the additional redeployment efforts had not been successful and that the complainant would thus be separated from service on 31 March 2014. On 26 March 2014 the complainant went on certified sick leave for an initial period of 20 days; this period was subsequently extended. On 27 March OHR wrote an email to the complainant regarding his separation formalities. The complainant replied that same day stating that he was on certified sick leave and could not be separated on 31 March 2014. In April 2014 the FAO's Chief Medical Officer requested the complainant to undergo an independent medical evaluation, which the complainant did on 12 May 2014. In his report of 16 May 2014, Dr P., the designated medical practitioner, concluded that the complainant had "the functional ability to return to work". By a letter of 28 May 2014, the Director of OHR informed the complainant that, in light of Dr P.'s medical evaluation, the unused portion of his sick leave would be withdrawn and his separation would be considered effective as from 16 May 2014, i.e. the date of Dr P.'s medical evaluation report.

On 21 August 2014 the complainant lodged an appeal with the Director-General against the 28 May 2014 decision. Further to the rejection of this appeal on 20 October 2014, the complainant lodged on 17 December 2014 an appeal with the Appeals Committee which, in its report of 3 March 2017, recommended that the appeal be dismissed. By a letter of 29 May 2017 the Director-General informed the complainant that he concurred with the Appeals Committee's recommendation. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision, contained in the letter of 29 May 2017, and to reinstate him in a suitable position with back pay from the date of his separation until the date of his reinstatement. In the event that he is not reinstated, he asks the Tribunal to pay him: 115,000 euros as compensation for the difference between his current pension and the salary and allowances he would have received if he had worked from the date of his termination (16 May 2014) until he reached the mandatory retirement age of 62 (September 2020); and 155,500 euros as compensation for the difference between his current pension and that which he would have received if he had worked until he reached the mandatory retirement age of 62.

In the event that he is neither reinstated nor compensated as per his requests above, the complainant asks the Tribunal to order the FAO to compensate him for the loss of the higher salary and pension benefits he would have obtained if he had continued to be employed until the end of the period of his certified sick leave, i.e. 14 January 2015, or, alternatively, to order the FAO to compensate him for the loss of earning capacity caused by its prejudicial conduct. He seeks 30,000 euros in moral damages and 5,000 euros in costs.

The FAO asks the Tribunal to dismiss the complaint as partly irreceivable and unfounded in its entirety.

## CONSIDERATIONS

1. The complainant impugns the decision of 29 May 2017 by which the Director-General endorsed the unanimous recommendation of the Appeals Committee to reject the complainant's appeal against the

decision of 28 May 2014. In the impugned decision, the Director-General also referred to the 24 March 2014 decision, which confirmed the earlier 30 December 2013 decision to terminate the complainant's appointment following the abolition of his post and the unsuccessful redeployment process. The 28 May 2014 decision withdrew the unused portion of the complainant's sick leave and set the complainant's separation date retroactively to 16 May 2014, the date of the independent medical evaluation report which concluded that the complainant had "the functional ability to return to work".

2. The grounds for complaint are as follows:

(a) the FAO violated Staff Rule 302.6.217 by not referring the complainant's case to a "recognized medical institution";

(b) the "independent medical evaluation" was, in fact, an evaluation by a medical practitioner designated exclusively by the FAO, Dr P., and cannot therefore be considered independent;

(c) the medical reports prepared by the complainant's treating physicians were completely ignored by Dr P., as well as by the Appeals Committee and the Director-General in his final decision;

(d) the 16 May 2014 medical evaluation report by Dr P. was misconstrued and used as the basis to allow the FAO to unlawfully separate the complainant from service and to withdraw the unused portion of his sick leave;

(e) the FAO violated its duty of care during the redeployment process following the abolition of the complainant's post, as it did not make any concrete efforts to redeploy him and did not take into account his desire to remain in service until 6 September 2014, which would have allowed him to reach 30 years of contributions to the UNJSPF;

(f) the complainant was subjected to harassment; and

(g) the length of the internal appeal process was egregious.

3. The FAO submits that the complainant's claims concerning the termination decision and the decision to consider his separation effective as of the date of issuance of Dr P.'s report are either not receivable, unsubstantiated, or without merit.

4. The Tribunal finds that the complainant's claims relating to Staff Rule 302.6.217 (specifically, the non-referral of his case to a "recognized medical institution"), the irregularity of the procedure relating to the designation of the medical practitioner by the FAO, and the lack of independence of that medical practitioner, as well as the complainant's claim of harassment (claims (a), (b), and (f), listed above) are irreceivable for failure to exhaust all internal means of redress. The complainant did not contest the designation of Dr P. as the medical practitioner assigned to conduct the independent medical evaluation, when he was relevantly notified thereof (by an email of 2 April 2014), nor did he raise the above-mentioned claims regarding the designation of Dr P., or the independence of Dr P.'s medical evaluation report, in his appeal before the Appeals Committee. In his appeal the complainant mainly challenged the FAO's interpretation of Dr P.'s medical evaluation report, but not the report itself or the choice of the doctor assigned to conduct the evaluation. With regard to the claim of harassment, the Tribunal notes that the complainant raised the issue in his appeal to the Director-General (dated 21 August 2014) and also in his appeal to the Appeals Committee (dated 17 December 2014). The Appeals Committee indicated in its report of 3 March 2017 that it "considered the [complainant's] harassment claims and noted that it was not competent to review [those] claims" because the complainant had not followed the proper procedure for submitting a complaint of harassment, as provided in the FAO's Policy on the Prevention of Harassment, set out in Administrative Circular No. 2007/5. It must be noted that the complainant was informed on several occasions about the proper procedure to be followed for submitting a harassment complaint but he did not file any such complaint. As he did not follow the proper procedure, he did not exhaust all internal means of redress available to him, as Article VII, paragraph 1, of the Tribunal's Statute requires.

5. The complainant's claim that the FAO violated its duty of care during the redeployment process (claim (e), listed above) is irreceivable, as the 24 March 2014 decision, to which it was intrinsically tied and in connection with which it ought to have been raised, was not challenged within the 90-day time limit in accordance with Staff Rule 303.1.311.

Consequently, the 24 March 2014 decision and all elements directly related to it are now immune from challenge. The complainant asserts that, as the Assistant Director-General did not raise any objection to receivability in his 20 October 2014 response on behalf of the Director-General to the complainant's 21 August 2014 appeal, the FAO could not then raise the issue of time bar for the first time before the Appeals Committee. The complainant is mistaken. The response to an appeal to the Director-General is merely a first step in the process which leads to a final decision. While the response should include justification for the decision it presents, it does not constitute a final decision in itself and can therefore be amended in the course of the appeal process resulting in a final decision. The FAO was under no obligation to raise the issue of receivability in the Director-General's response to the complainant's appeal and was entitled to do so in its response to the complainant's appeal before the Appeals Committee.

6. The complainant's claims that the medical reports by the complainant's treating physicians were not properly considered and that the 16 May 2014 medical evaluation report by Dr P. was misconstrued by the FAO (claims (c) and (d), listed above) are unfounded. The Chief Medical Officer considered the medical reports that were provided by the complainant's treating physicians, and his disagreement with the medical facts contained therein served as the basis for his request for the complainant to undergo an independent medical evaluation, in accordance with Staff Rule 302.6.217, which provides as follows:

> "When there is a difference of opinion on the medical facts regarding sick leave under these Rules, the Chief Medical Officer or the staff member may request that the matter be referred to a recognized medical institution designated by the Organization for advice. Further sick leave may be refused or the unused portion withdrawn if the physician designated by the recognized medical institution determines that the staff member is able to return to duty."

The FAO's decision to withdraw the unused portion of the complainant's sick leave with effect from the date of the independent medical evaluation report (16 May 2014), in which it was found that the complainant was able to return to work, was lawful as it was taken in accordance with Staff Rule 302.6.217, cited above. It is clear from Dr P.'s detailed report

that during his medical evaluation of the complainant, Dr P. took into account the complainant's medical history as well as his current health status. Dr P. concluded: "At present, given the normal [relevant medical evaluation score], [the complainant's] excellent physical status and his cross-sectional exam, I believe [the complainant] has the functional ability to return to work." The fact that Dr P. also noted that the complainant's return to work could also be beneficial to him, in Dr P.'s own words "highly therapeutic", was irrelevant to the main question on which the complainant's sick leave hinged, namely whether or not the complainant was fit to return to work, to which the answer was positive.

7. The claim based on excessive delay in the internal appeal process (claim (g), listed above) is well founded, as it is clear that the FAO breached its obligation to ensure that the appeal process moved forward with reasonable speed. The complainant filed his internal appeal with the Appeals Committee on 17 December 2014, having previously received, on 20 October 2014, the rejection of his 21 August 2014 appeal to the Director-General. Although the written pleadings were completed by 20 May 2015, it was not until 22 January 2017 that the complainant was notified that his appeal was scheduled to be considered by the Appeals Committee on 16 February 2017. The Appeals Committee reviewed the complainant's appeal on that date and submitted its report and recommendation on 3 March 2017. The Director-General's final decision was notified to the complainant by a letter dated 29 May 2017. The total length of the internal appeal proceedings was about two years and nine months, which included a delay of one year and nine months (between the date when the written pleadings were completed and the date when the appeal was finally considered by the Appeals Committee), during which nothing was done with the complainant's appeal. That delay was too long and the complainant has convincingly motivated the prejudice which he suffered by referring to his further distress and anxiety caused by that delay. Given the length of the delay and the impact that it had on the complainant, in view of his personal circumstances, the Tribunal will award the complainant moral damages in the amount of 3,000 euros. As the complainant succeeds in part, he is entitled to an award of costs, which the Tribunal sets at 3,000 euros.

DECISION

For the above reasons,

1. The FAO shall pay the complainant moral damages in the amount of 3,000 euros.

2. It shall pay him costs in the amount of 3,000 euros.

3. All other claims are dismissed.

In witness of this judgment, adopted on 9 May 2019, Mr Giuseppe Barbagallo, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ